REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY,

DURING THE TIME OF

Lord Chancellor Eldon;

FROM THE

COMMENCEMENT OF THE SITTINGS BEFORE HILARY TERM, 1818,

TO THE

END OF THE SITTINGS AFTER MICHAELMAS TERM, 1819.

BY CLEMENT TUDWAY SWANSTON, ESQ.

OF LINCOLN'S INN, BARRISTER AT LAW.

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1821.

ADVERTISEMENT.

THE engagements of the Editor having rendered impracticable the farther prosecution of his design, undertaken on the retirement, and at the suggestion, of Mr. Merivale,* he has the gratification of relinquishing it to successors in every respect qualified to satisfy the expectations of the profession. The remaining decisions to the close of the year 1819, will be published without delay; from that time, the Reports of Cases decided by the Lord Chancellor and the Master of the Rolls, are continued by Mr. Jacob and Mr. Walker.

* Advertisement prefixed to the Second Volume of Mr. Merivale's Reports.

PREFACE.

On submitting to the Public a new collection of Reports, some account may be expected of the plan observed in the compilation.

It has been frequently remarked, that one of the most common defects of Reports, is an imperfect statement of the case. A conviction of the justice of this censure, has induced the Editor, in many instances, to preface the decision by a more full narrative of facts, and abstract of documents, than may at the first view appear desirable. He has also, in general, preserved an outline of the form, without affecting to vary the phraseology, of the pleadings.

Of the argument, it was thought sufficient to exhibit the condensed substance, together with all the authorities cited. The principal object of attention has been to represent exactly the train of reasoning by which the Court arrived at a conclusion, and connected the facts of the case with the general doctrine of the law.

For the purpose of authentication, wherever it was practicable, the corresponding entry in the Registrar's books has been examined, a reference to which is added; and when it appeared useful, an extract of the order.

In preparing the cases for publication, the Editor, after consulting every authority cited in court, was frequently induced to pursue the inquiry; and on some important questions, traced from its origin the history of the law, and endeavoured to deduce the theory of the successive decisions. The notes subjoined to many of the judgments are the results of this investigation. For such of them as contain a mere enumeration, or compendious classification, of authorities, no excuse, it is presumed, will be required. For others, in which the Editor has ventured to introduce discussions, his apology is, that they concern questions of practical importance, on which either no attempt had been made to arrange the mass of scattered doctrine, or opinions were prevalent which more minute research discovered to be questionable.

Could the Editor indulge the belief, that he has materially contributed to preserve and render accessible, a series of decisions, in which, by an union of juridical talent and learning never surpassed, the doctrines of equitable jurisprudence have assumed the character of a systematic science, he would think that he leaves not wholly undischarged, that debt which every man is said to owe to his profession. One debt, he is conscious, he never can discharge; the debt of gratitude for kind encouragement and effectual co-operation.

LORD ELDON, *Lord High Chancellor.*

Sir THOMAS PLUMER, *Master of the Rolls.*

Sir JOHN LEACH, *Vice-Chancellor.*

Sir SAMUEL SHEPHERD, *Attorney-General.*

Sir ROBERT GIFFORD, *Solicitor-General.*

A

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ERRATA.

Page 5. line 3. *for* BRIGHTENS *read* BRIGHTWIN.
—— 7. — 14. *for* RICHARD *read* RICHARDSON.
—— 8. — 3. from bottom, *for* 17. *read* 16.
—— 114. — 8. from bottom, *for* 15,000l. *read* 15,000.
—— 125. note (b *for* 17. *read* 16.
—— 168. line 4. *after* or, *insert* whose clerk is.
—— 171. — 7 *for* any *read* an
—— 535. — 2. from bottom, *for* JOHN *read* THOMAS.
—— 155. note, line 10. from bottom, *for* complete *read* complex.
—— 512. note, line 14 and 15. *for* seasonable *read* reasonable.



REPORTS

OF

CASES

ARGUED & DETERMINED

IN THE

HIGH COURT OF CHANCERY,

Commencing in the Sittings before

HILARY TERM,

58 Geo. 3. 1818.

1818.

COMMERELL *v.* POYNTON.

Jan. 12.

A solicitor declining to be farther concerned in a cause is not entitled to compel payment of his costs, by refusing to permit such inspection of the papers in his hands, or such production of them before the Court or the Master, as may be necessary in the conduct of the cause.

DURING the proceedings in the Master's Office, preparatory to his report in this cause, disputes having arisen between the Defendant and his solicitors, they, on the 29th of *November* 1817, wrote a letter to him, desiring him to consider that they were no longer concerned as his solicitors, apprizing him that the Plaintiff would, on the day appointed, proceed on his charge, which would be followed by the Master's report; and declaring their readiness to deliver the papers to any person whom he might appoint, on discharge of their accounts.

On the 13th *December* 1817, a motion was made by the Defendant, that the solicitors might be "ordered to proceed as solicitors in this cause for the Defendant to the termination of the same, or that they might, on a short day

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COMMERELL v. POYNTON.

day to be named by the Court, deliver up to him all his papers in their possession relating to the said cause."

Mr. *Cooke*, in support of the motion, referred to an anonymous case in *Siderfin*, 31. *pl.* 8., and to *Creswell* v. *Byron*. (*a*)

Sir *Sam. Romilly* and Mr. *Simpkinson* against the motion.

The LORD CHANCELLOR.

Jan. 12.

This is a motion of great importance to the suitors in this court. I should be unwilling to establish a new rule without the concurrence of the Judges, but in this I am quite clear, that no solicitor in this court can say to a suitor in this court, I have such a lien on your papers that I will neither deliver them to another solicitor, nor permit another solicitor, whom you may employ, to make such use of them as is necessary for proceeding with the suit. The solicitor who has possession of the papers must allow the new solicitor to see them at all reasonable times; and must himself attend with them before the Master, or suffer the new solicitor to have them for that purpose. A solicitor cannot, by virtue of his lien, prevent the king's subject from obtaining justice. (*b*)

The order directed the solicitors to permit the Defendant, or his agents, to inspect the Defendant's deeds, papers, and writings in this cause in their possession, at all reasonable times, and on giving reasonable notice, and the Defendant was to be at liberty to take copies thereof, or extracts therefrom, as he should be advised, at his own expence; and the order farther directed the solicitors to produce the said deeds, papers, and writings before the Master, on taking the accounts, and making the enquiries directed by the

(*a*) 14 *Ves.* 271. (*b*) See *Ross* v. *Laughton*, 1 *Ves. & Beam.* 349.

the decree, and at the hearing of the cause for further directions.

Ex parte BRIGHTENS,
In the Matter of WILLIAM WELLS, a Bankrupt.

Jan. 13.

On a petition for the sale of mortgaged premises by an equitable mortgagee under a written agreement for a mortgage, the petitioner is entitled to costs.

THE bankrupt, some time before the bankruptcy, had signed a written agreement for executing a mortgage of certain premises to the petitioner, within a month from the date of the agreement. The petition prayed the usual order for the sale of the premises. No objection was made to the prayer of the petition, but it was insisted that, by the practice of the Court, the order must be made without costs.

Sir *Sam. Romilly* and Mr. *Rose* for the petition.

Mr. *Girdlestone* for the assignees.

The LORD CHANCELLOR.

I have thought it right to withhold costs in those cases in which there is no evidence of the agreement to mortgage, but a deposit of deeds, cases with which in the administration of justice, it is extremely difficult to deal; but where the agreement is in writing, I think the mortgagee entitled to costs.

Jan. 14, 15.

Ex parte SMITH.

Commission of lunacy directed to be executed in the neighbourhood in which the lunatic resided prior to his lunacy, not in that to which he had been since conveyed; although evidence was given of his inability to bear removal.

ON the 15th of *November* an order was made, on the petition of *Anne Smith* the wife of the supposed lunatic, that a commission in the nature of a writ *de lunatico inquirendo* should be issued, to enquire of the lunacy of *Thomas Smith*. Two petitions had been since presented; one by *Anne Smith*, praying that the commission might be executed at *Lampeter Pontstephen*, in *Cardiganshire*; the other by *Mary Smith*, mother of the supposed lunatic, praying that the commission might be executed at *Swansea*, in *Glamorganshire*. The facts of the case appeared to be as follows.

Thomas Smith, the supposed lunatic, had resided during the last fourteen years at *Olmarch*, or at *Vailallt*, both of which places are in *Cardiganshire*. On the 4th *October* last, on his way from *Olmarch* to *Llanstephen*, a bathing-place in *Caermarthenshire*, he fell from his horse on his head, and, after that accident, betrayed many symptoms of lunacy during his stay at *Llanstephen*, where he remained three days, and after his return to *Olmarch*. On the 10th of *October*, *Thomas Smith*, together with his wife, went again to *Llanstephen*; and on the *Sunday* evening following, his mother and one of his brothers, in the absence of his wife, (who returned to *Olmarch*, respecting the removal of some furniture to *Llanstephen*, leaving him under the care of a person who had been in his service during the last six years,) removed him in a post-chaise to *Swansea*, and placed him under the care of a physician practising there, who conducted an establishment for the reception of lunatics.

Several witnesses examined on the part of the wife deposed, that they had long known *Thomas Smith*, and always considered him a person of sane mind till some time after the

the 4th *October*. It was also sworn by her solicitor, that all the witnesses whom it would be material to examine on her part (except the physician under whose care *Thomas Smith* was placed at *Swansea*) reside within ten miles of *Lampeter*, including several magistrates and clergymen, whose attendance in *Swansea*, at a distance of about fifty miles, would be very inconvenient to themselves, and to the inhabitants of their respective places of residence, and would subject *Anne Smith* to an expense which she was unable to sustain. On the part of *Mary Smith*, the affidavits of the physician under whose care *Thomas Smith* was placed at *Swansea*, and another medical man practising there, stated their belief, that the disease was of considerable duration, and not caused or increased by any fall or sudden corporal violence. They also stated, that the mental disorder of *Thomas Smith* had increased, and corporal complaints of an alarming nature supervened, since his arrival at *Swansea*; that apoplexy or palsy would be the probable consequence of agitating either his body or mind; and that his removal from *Swansea* would be highly dangerous, if not impracticable.

The affidavit of *Mary Smith* stated, that the removal of *Thomas Smith* to *Lampeter* would bring to his view a great number of persons with whom he had, during his residence at *Olmarch*, various personal altercations and disputes, of which the occurrence had in part caused, and the recollection would aggravate, his malady.

Mr. *Hart* and Mr. *Roupel*, in support of *Mary Smith*'s petition, insisted that the fact of lunacy being undisputed, the place in which the enquiry was conducted could not be material; and that no sufficient reason was alleged for endangering the life of the lunatic by removal.

Sir *Sam. Romilly* and Mr. *Wear*, for the petition of *Anne Smith*. The fact of lunacy is undisputed; the mate-

 rial

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rial subject of enquiry is, at what period it commenced. The proper place for such an enquiry, is the neighbourhood in which the lunatic resided during the time to which the enquiry refers. The lunatic was married in *July*; and the true object of his relatives is to invalidate that marriage.

During the argument the Lord Chancellor made the following observations.

The old and settled law is, that I cannot grant a commission of lunacy to be executed at any other place than the residence of the supposed lunatic. (*a*) If a man resident in the city of *London* were conveyed by force into *Essex*, he would still for this purpose be resident in the city. A man cannot be said to reside in a place to which he has been carried while he had not mind enough to intend a change of residence.

Reason of the enquiry from what period the lunacy commenced. When the lunacy is of some duration, and the lunatic has performed acts, the principle on which the crown extends its protection requires an examination into the circumstances of competence or incompetence.

The reason of the enquiry, usual at all times, from what period the lunacy commenced, is this, that when it appears that the lunacy is of some duration, and that the lunatic has performed acts, the principle on which the crown extends its protection requires that an examination shall be instituted into the circumstances of competence or incompetence under which those acts were performed.

Jan. 15.

The LORD CHANCELLOR.

The object of the enquiry in this case being rather to ascertain the time at which the lunacy commenced, than the fact of lunacy, it is material that the commission should be executed among persons who knew the state of the individual prior to the accident to which, by the witnesses on one side, the lunacy is imputed. It is a practice by

(*a*) See *Ex parte Hall*, 7 *Ves.* 261.

no means uncommon in cases of lunacy, (analogous to a practice very common in civil cases,) that when the lunatic cannot be removed to the jury, and it is inconvenient for the jury to go to the lunatic, one or two of the jury examine the lunatic, and report their observations to the rest. I take *Cardiganshire* to be, within the meaning of this commission, the place of residence of the lunatic; nor do I find sufficient in the evidence to authorize me to direct the commission to be executed elsewhere. The real object being to ascertain the validity of the marriage, I shall not do my duty unless I take care that that question is properly investigated. The commission must be issued into *Cardiganshire.*

EVANS *v.* RICHARD.

Jan. 15.

The Plaintiff is entitled to the production of documents referred to in the answer, and admitted to be in the custody of the Defendant, although although an injunction obtained by the Plaintiff has been dissolved, on the ground, that the contract which he seeks to enforce is illegal.

THE Defendant, an *English* subject, being in *America* during the war with this country, in *July* 1814, entered into an agreement with the Plaintiff, an *American* citizen, to make, on his return to *England*, a shipment of certain goods to *America*, on the joint account of himself and the Plaintiff, provided that the war should then continue, and not otherwise. On his return to *England* the Defendant accordingly shipped goods to *America*, but not till after the signature of preliminaries of peace; and from the Plaintiff's conduct had reason to think that for the purpose of declining any share in the adventure, he designed to avail himself of the objection that the shipment was made, contrary to the terms of the agreement, after the cessation of war. The Defendant having brought an action against the Plaintiff to recover a balance due in respect of certain other transactions, the Plaintiff filed this bill for an account of the profits of the shipment to *America*, and obtained an injuction to restrain the Defendant's

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fendant's proceedings in the action at law. On a former day, the Lord Chancellor dissolved the injunction; considering the contract as a trading undertaken with an alien enemy, in fraud of the laws of this country, and not entitled to the aid of the court. An order having been afterwards obtained, on a motion before the Vice-Chancellor, for the production of certain letters and other documents referred to in the answer, the Defendant now moved to discharge that order, on the ground that the Court having declared the contract illegal, and the Plaintiff not entitled to relief in equity, no advantage could be derived from the inspection of the papers.

The Solicitor-General and Mr. *Bickersteth* in support of the motion.

The Lord Chancellor.

In ordering the production of documents, the Court proceeds on the principle, that they are by reference incorporated into the answer, and become a part of it.

The event of this motion must depend on the fact, whether the answer contains an admission, that the documents in question are in the custody of the defendant. When the Court orders letters and papers to be produced, it proceeds on the principle, that those documents are, by reference, incorporated in the answer, and become a part of it. Being in the office, the effect is the same as if they were stated in *hæc verba* in the answer. (*a*) This motion, therefore, in effect, seeks to strike out a part of the answer. The Plaintiff may amend his bill, by omitting the allegation from which the illegality of the contract appears; and the admission remaining in the answer entitles him to the production of the papers.

(*a*) For the practice of the Court, with reference to the production of documents referred to by the answer, see *Gardiner* v. *Mason*, 4 *Bro. C. C.* 479. *Darwin* v. *Clarke*, 8 *Ves.* 158. *Taylor* v. *Milner*, 11 *Ves.* 41. *Atkyns* v. *Wright*, 14 *Ves.* 211. *Beckford* v. *Wildman*, 1[illegible] *Ves.* 438. *Marsh* v. *Sibbald*, 2 *Ves. & Beam.* 375. and *The Princess of Wales* v. *The Earl of Liverpool*, *post*.

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THOMAS WILLIS, - - - PLAINTIFF;

Jan. 15.

JOHN PARKINSON, and ISAAC WOOD, a Lunatic, and MARGARET FOSTER, JOHN DARCY and ELIZABETH his Wife, Committees of the said Lunatic, - - - - - DEFENDANTS.

On a bill by a prebendary against his lessees, for a commission to ascertain the boundaries of the prebendal lands, the prebendary is entitled to name as many commissioners as his lessees.

THE Plaintiff was prebendary of *Asgarby* in *Lincolnshire*; the Defendants were lessees of the prebendal lands, and also owners of freehold and copyhold lands, within the manor forming part of the prebend; the bill prayed a commission to ascertain the boundaries of the prebendal lands: a decree had been made for that purpose (*a*), and the Plaintiff now moved that he might name as many commissioners as the Defendants.

Sir *Sam. Romilly* in support of the motion.

Mr. *Parker*, for the Defendants.

The LORD CHANCELLOR.

The Plaintiff has a right to consider all the persons his lessees, *as his lessees*, although they have distinct freehold and copyhold estates in the manor. Subject to the same obligation not to suffer intermixture of lands, and claiming under the same lease, they constitute *quoad* the prebendal rights, one person. Each of the co-lessees is under an obligation, not only not to intermix lands, but not to suffer that intermixture by his co-lessees: an obligation attaching upon each, in respect of all. They have one interest as the lessees of the plaintiff; and that interest is connected with a duty which rests upon them all, that each and every of them shall not bring into difficulty the title to the lands.

(*a*) See the case more fully stated 2 *Mer.* 507.

1818.

Jan. 16.

SMITH v. ———

Notice for *Monday* the 12th *January*, being the first seal before *Hilary* term, is good notice for the first seal, though held on *Thursday* the 15th *January*.

IN this cause Sir *Sam. Romilly* moved that a tenant might be ordered to pay rent to the receiver: the motion was not opposed; but he mentioned an inaccuracy in the terms of the notice of motion. The notice expressed that the Court would be moved on *Monday* the 12th day of *January*, being the first seal before *Hilary* term: the first seal was held on this day, *Thursday* the 15th of *January*. He submitted that the notice must be understood as notice for the first seal, though the day on which it was held happened to be mis-stated.

The LORD CHANCELLOR made the order.

Jan. 16.

Ex parte THE BANK OF ENGLAND, In the Matter of RICHARD STEPHENS, a Bankrupt.

Corporations may prove debts under commissions of bankruptcy, by the affidavit of a person authorized by a general power of attorney, and vote in the choice of assignees by a person authorised by a special power of attorney, under their common seal.

THE petition stated, that *John Sparkes Cox*, a clerk of the Bank, being authorized by letter of attorney under the corporate seal of the Governor and Company of the Bank of *England*, to prove debts due to them under commissions of bankruptcy, attended to prove a debt of 8200*l.* 12*s.* 6*d.* due to the Bank under the commission issued against *Richard Stephens*, and also to vote in the choice of assignees, the Governor and Company of the Bank having, by a special letter of attorney under the bank seal, authorized him to vote in the choice of assignees of the said bankrupt's estate: that an objection being made, that the debt should be proved by one of the corporation and not by a clerk, the commissioners refused to receive the proof of the

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the debt by *Cox*, conceiving that the Bank is not authorized to prove debts under commissions of bankruptcy by a clerk, without having obtained from the Lord Chancellor either a general order for that purpose, or a particular order for the proof of the individual debt. The petition prayed that the commissioners under the commission against *R. Stephens* might be ordered to receive the depositions of *J. S. Cox*, in proof of the petitioners' debt of 8,200*l.* 12*s.* 6*d.*; and that, in order to prevent a repetition of such objections for the proof of the petitioners' just debts under commissions of bankruptcy, it might be declared that the petitioners are in all cases entitled to prove debts under commissions of bankruptcy by any of their officers or clerks duly authorized by them for that purpose, and that the petitioners are entitled by any of their officers or clerks, or by an agent under a special power of attorney for that purpose, under their corporate seal, in each bankruptcy, to vote in the choice of assignees; evidence being produced to the commissioners, by affidavit, or by the *viva voce* examination of a witness, that the seal annexed to such powers of attorney respectively is the corporate seal of the petitioners; and that the petitioners might, by the said *J. S. Cox*, be at liberty to vote in the choice of assignees under the commission against *Stephens*, by virtue of the special power of attorney to him for that purpose.

Sir *Arthur Piggott* and Mr. *Cooke* for the petition.

Mr. *Montague*, for the petitioning creditor, made no objection.

The LORD CHANCELLOR.

The Bank, like every other corporation, is entitled to prove a debt under a commission of bankruptcy, by the affidavit of a person duly authorized by a general power of attorney, and to vote in the choice of assignees by a person duly authorized by a special power of attorney, under their common

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common seal. It may be proper to make a general order relative to all corporations; but a general order cannot be made on a particular petition in a particular bankruptcy.

The following order was made:

I do declare, that the said petitioners, the Governor and Company of the Bank of *England*, are by law entitled by any of their clerks or agents competent and duly authorized for that purpose, to prove under any commission of bankrupt, any debt or debts which may be due to the said Governor and Company, from the bankrupt or bankrupts against whom such commission has been or shall be issued, and also that the said Governor and Company are entitled by law to authorize and empower any person, by letter of attorney under their corporate seal, in each separate bankruptcy, to vote in the choice of an assignee or assignees under any such commission of bankrupt as aforesaid, against any person or persons, under which commission the said Governor and Company shall prove any debt or debts; and that the person or persons so to be authorized as aforesaid, by the said Governor and Company to vote in the choice of assignees, ought to be permitted to vote in such choice accordingly, upon producing to the major part of the commissioners named in any such commission, a special power of attorney for that purpose under the corporate seal of the said Governor and Company, and proving the same to be sealed with such corporate seal by affidavit or *viva voce* before such commissioners; and I do order that the commissioners named in the said commission against the said *Richard Stephens*, or the major part of them, do receive the proof of the said debt of 8200*l.* 12*s.* 6*d.* in the said petition mentioned, as a debt under the said commission, by the said *John Sparkes Cox* the clerk of the petitioners, without the production to the said commissioners of the authority from the petitioners to the said *John Sparkes Cox* to prove the said debt; and I do further order that the

said

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said *John Sparkes Cox* be permitted to vote in the choice of assignees under the said commission against the said *Richard Stephens*, on behalf of the said petitioners, upon his producing to the said commissioners, or the major part of them, a special letter of attorney under the corporate seal of the said petitioners, authorizing him to vote in such choice of assignees, on their behalf, and proving before the said commissioners, by affidavit or *viva voce*, the seal to such letter of attorney to be the corporate seal of the said petitioners. (*a*)

(*a*) The order made on the petition of the Bank of *England* in the bankruptcy of *Bowles*, heard 16th *August*, 1810 *, (for a copy of which the reporter is indebted to the kindness of Mr. *Cooke*), directed the commissioners to receive the affidavit of *J. S. Cox* as proof of the petitioner's debt, without the production of the authority from the petitioners to *Cox* to make such affidavit on behalf of the petitioners. The case reported in 18 *Ves.* 228., upon a similar petition, and which, in argument, has been represented as the same, differs in the names of the parties, and in the date.

* 1 *Rose*, 142.

GEORGE MURLESS and BETTY his Wife, PLAINTIFFS;

AND

MATTHEW FRANKLIN and RICHARD FRANKLIN the Younger, - - - DEFENDANTS.

Jan. 17. 19. 20.

A father having purchased in the names of his sons a copyhold estate, which he afterwards demised by licence obtained subsequently to the purchase; the sons take the estate successively, as an advancement. To repel the presumption of advancement, evidence of the father's intention must be contemporaneous with the purchase.

RICHARD FRANKLIN having three sons, *Matthew* (the eldest), *John*, and *Richard*, in 1779 purchased the reversion of a copyhold tenement holden of the manor of *North Curry*, in the county of *Somerset*, expectant on the death of *Frances Wright*; and, at a court baron on the

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7th *December* 1779, took the reversion of the said tenement, "To hold the same unto the said *John Franklin*, *Matthew Franklin*, and *Richard Franklin*, sons of the said *Richard Franklin* the elder, for their lives and the life of every and either of them longest living, successively according to the custom of the said manor, immediately after the determination of an estate then subsisting on the said premises, for the life of *Frances Wright*;" and *Richard Franklin* the father, and *John*, *Matthew*, and *Richard* the son, were admited tenants as in reversion. By the custom of the manor, (as alleged in the bill,) a tenant may, by licence in writing, entered in the court rolls, demise a tenement holden of the manor, whether in possession or reversion, for a term of ninety-nine years. On 2d *April* 1781, a licence was given to *Richard Franklin* the elder, to demise the tenement in question, for any term of years, determinable on the deaths of his sons *John*, *Matthew*, and *Richard*; and by indenture bearing date 5th *May* 1781, on the marriage of *John Franklin* and *Betty Dare*, *Richard Franklin* the elder demised the said tenement to *Robert Ludwell*, his executors, administrators, and assigns, for the term of ninety-nine years, (to commence from the death of *Frances Wright*,) if *John*, *Matthew*, and *Richard* the son, or any of them, should so long live; upon trust to permit the premises to be held and enjoyed by *Richard Franklin* the elder, and after his decease by *John Franklin* for his life, and after his decease by *Betty Dare* for her life, and after the death of the survivor of them, in trust for the children of *John Franklin* and *Betty Dare*, in such proportions as *John Franklin* should appoint, and in default of appointment equally; and for default of such issue, in trust for the executors, administrators, and assigns of *John Franklin*.

The Plaintiff, *Betty Murless*, was the only issue of *John Franklin* and *Betty* his wife. *John Franklin* having survived his wife, married again, and died during the life of *Richard Franklin* the elder, without having made any appointment.

By

By his will, dated 22d *October* 1791, duly executed and attested to pass freehold estates, *Richard Franklin* the the elder devised and bequeathed to his sons *Matthew* and *Richard*, and to the widow of his son *John*, certain legacies and freehold and copyhold estates, (some of which were holden of the manor of *North Curry*, in the names of his sons *Matthew*, *John*, and *Richard*,) and shortly after died. *Matthew Franklin* and *Richard Franklin* the son, caused the following memorandum to be endorsed upon the probate copy of their father's will: "We hereby ratify and confirm the will of which the within is a probate copy, and the gifts, devises, and bequests therein contained, in all respects whatsoever, so far as we can or lawfully may. 16th *April* 1793." *Frances Wright*, the tenant for life, having died in 1816, *Matthew Franklin* commenced an action of ejectment to recover possession of the premises.

The bill prayed that the indenture of the 5th *May* 1781, so far as respects the demise of the said copyhold premises, may be established and confirmed, and the trusts thereof carried into execution, for the benefit of the Plaintiffs, and that *Matthew Franklin* and *Richard Franklin* the younger may be declared to be trustees of the said premises for the Plaintiffs, and to have no beneficial right or interest therein, but subject to the aforesaid indenture of settlement; and that, in the mean time, *Matthew Franklin* may be restrained by injunction from proceeding in the said action of ejectment.

By his answer, *Matthew Franklin* denied any knowledge of the licence to lease granted to *Richard Franklin* the elder, or of the settlement made by him, till some years after their respective dates, or any assent to the settlement. He also denied the existence of a custom to enable the tenant to grant the tenement, by virtue of a licence, so as to affect the interest of the nominees, being his children, unless the licence is obtained at the same court at which the purchase is made, and the copy of the court-roll granted.

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The usual injunction having been obtained, and the usual order *nisi* on the filing of the answer, Sir *Samuel Romilly* now shewed cause against dissolving the injunction.

The question is, whether the father intended an advancement, or used the names of his sons as trustees for him. It must be admitted, since the case of *Dyer* v. *Dyer* (*a*), that when a father purchases in the names of his children, the presumption is that he intends an advancement; but this presumption arises from the nomination of children only as a circumstance of evidence, and may therefore be repelled by contrary evidence. The present case contains satisfactory evidence of the father's intention that his sons should take as trustees. In *April* 1781, only sixteen months after the purchase, he obtained a licence; and in the ensuing month, demised the tenement in question as a provision for his son *John* on his mariage. In that settlement the eldest son acquiesced. Having notice, not before the marriage certainly, but within a few months after, he made no claim while the father lived, but by his silence entitled himself to the benefits which he derives under his will. It is fraudulent, insisting on those benefits, to dispute the settlement. The father by his will disposes of other copyhold estates purchased in the names of his sons, and that disposition the defendants have not attempted to impeach.

Mr. *Hart* and Mr. *Farrer* against the injunction.

The evidence to repel the presumption, arising from the nomination of children in a purchase by a father, must be derived from circumstances contemporaneous with the purchase; subsequent declarations by the father, (whatever may be the effect of acts of the children, *Rider* v. *Kidder* (*b*),) are ineffectual. *Finch* v. *Finch* (*c*). This case contains

(*a*) 2 *Cox*, 92. *Walk. Copyh.* 216. (*b*) 10 *Ves.* 360.
(*c*) 15 *Ves.* 43.

contains no such contemporaneous evidence. The circumstance that the father has taken the grant to his sons in an order different from that of their age, is strong proof that he intended an advancement. The eldest son has not acacquiesced in the settlement; the tenant for life died only in 1816; on her death he has immediately asserted his rights. The Plaintiffs, on their own statement, have a defence at law. Under the custom alleged, the demise of the father by licence vested the legal estate in his lessees, *Swift* v. *Davis* (a); and the elder son, therefore, not being entitled to recover in ejectment, the Plaintiffs need not the aid of a Court of Equity.

Sir *Samuel Romilly*, in reply.

It is admitted that the father, in repeated instances, took grants of estates in the names of his sons; estates not reversionary but immediate; that he continued till his death in the enjoyment of those estates, and then devised them from the nominees. That is evidence contemporaneous that the sons took as trustees.

The LORD CHANCELLOR.

The general rule that on a purchase by one man in the name of another, the nominee is a trustee for the purchaser, is subject to exception where the purchaser is under a species of natural obligation to provide for the nominee. The purchase in this case being *prima facie* a provision for the sons, it is necessary to repel that presumption by evidence which shows that, at the time, the father intended the purchase for his own benefit. Possession taken by the father at the time would amount to such evidence. How far transactions relative to other estates, claimed by another son, would be sufficient, requires much consideration. It seemed at first difficult to support the proposition, that the

(a) 8 *East*, 354. n.

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Plaintiff has a defence in ejectment, but on reference, the case cited (*a*) appears a strong authority for that purpose. Admitting, however, the effect of that case, still the demise would leave a reversion; and the father having no estates in *North Curry* except those held in the names of his sons, a question may arise on the will, whether, if a testator having estates of two classes, neither of which he is entitled to devise, uses terms comprehending both, he can be understood as not intending to comprehend both?

Jan. 26.

The LORD CHANCELLOR.

It is settled that though, in general cases, if *A.* purchases with his own money, and the conveyance is taken in the name of *B.*, an implied trust in favor of *A.* arises from the payment of the purchase money; yet that doctrine has exceptions. One exception is, that if a man purchases in the name of his son, and no act is done to manifest an intention that the son shall take as trustee, that intention will not be implied from the payment of the purchase money by the father, but the purchase is *primâ facie* an advancement. If the title to this estate stood on the transaction in *December*, 1779, when the interest in the copyhold was purchased, *John Franklin*, not the eldest son, being first named, no doubt can be entertained after the doctrine settled in *Dyer* v. *Dyer*, and followed in all subsequent cases, that this would be a purchase for the benefit of the sons, to take *successivè*, unless there was a custom in the manor controlling that doctrine, or contemporaneous evidence of a different intention.

In this case, the estate being reversionary, possession affords no evidence till the death of the tenant for life, which happened not till 1816.

(*a*) *Swift* v. *Davis*, 8 *East*, 354. *n.*

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It is contended by the bill, that in this manor there is a custom that a person purchasing in the names of his sons may afterwards obtain a licence to demise the purchased estate; and it is admitted, that in some manors a custom exists, that a father so purchasing may, at the time of the purchase, take a licence to demise, and that a licence to demise so taken is evidence of his intention to dispose of the property himself; and in the argument reference has been made to the doctrine of Lord *Kenyon* in *Swift* v. *Davis*, that a demise under the licence will devest the legal estate. If so, the title to this property might be tried by ejectment; but it is material to observe, that the Defendant swears that no custom exists in this manor, giving such effect to a licence taken at a subsequent time; and all the cases have gone strongly to this point, that the evidence of the intention of the father must apply to the time of the purchase: subsequent acts will not enable him to convert an advancement for his sons into a beneficial purchase for himself.

It is then insisted that the devise of other estates, taken in the names of his sons, is evidence that though in this instance the name of *John* precedes the others, it was equally the intention of the father to take a beneficial interest in this estate. I think, however, that it is impossible to qualify the effect of the original purchase of this estate, by transactions relative to other estates. The acts of *Matthew* and *Richard*, confirming the father's will, are evidence rather that without that confirmation the will was invalid, than that he had a right to make the devises which it contains.

The presumption arising from the circumstances of the purchase of one estate cannot be qualified by transactions relative to other estates.

It appears to me, that this case affords no evidence to reduce the legal effect of the grant, and repel the presumption, that the purchase was intended for the benefit of the sons.

It is then said that *Matthew* is concluded by his own acts and cannot be permitted in equity to disturb the settlement

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made by his father on the marriage of *John Franklin*. The mere fact of that settlement, unless the Defendant's conscience can be affected by acts done or permitted, will not impeach his title. It is difficult to maintain that, if the persons claiming as nominees in the grant have done nothing, and have been merely cognizant of the settlement, their non-interference would preclude them. But the evidence does not carry the case even to that extent. The Defendant denies that he acquiesced in the settlement; and avers that he has taken the earliest opportunity to assert his title.

The injunction must be dissolved.

Jan. 27.

JOHN HOLMES, PLAINTIFF;

THOMAS WAINEWRIGHT, and JOHN RAYNER, DEFENDANTS.

A party against whom a commission of bankruptcy had been maliciously obtained, and whom, after to superseding the commission, the Lord Chancellor had assigned the petitioning creditor's bond, having afterwards brought an action on the case against the petitioning creditor, and a rule of Court having been made by consent, referring the matters in dispute, except the bond assigned, to the award of an arbitrator, and an award having been made with an exception of the bond, an action cannot be maintained on the bond. An action on the case is a waiver of a right of action on the bond; and to restore that right the agreement of the parties must be unequivocal.

THE bill stated that the Plaintiff, an ironmonger at *Leeds*, in *June* 1800 applied to the Defendant *Wainewright*, an attorney, for the loan of 150*l.*, the repayment of which he proposed to secure by a mortgage of an estate at *Holbeck*, near *Leeds*; that *Wainewright* agreed to this proposal, and undertook to prepare the proper securities; and that accordingly on the 29th of *June* 1800, the Plaintiff executed the deeds prepared by *Wainewright*, and received the sum of 150*l.*; that the Plaintiff has since discovered that the principal deed which he was so prevailed on to execute, instead of being a mortgage, was an absolute con-

veyance

veyance of the premises, upon trust to sell, in the event of the sum of 150*l.* and interest not being repaid within three years from the date of the loan.

The bill farther stated, that in *December* 1800, on the petition of *Wainewright*, a commission of bankruptcy was awarded against the Plaintiff, which, on the 10th of *August* 1801, was superseded, and it was ordered that *Wainewright* should pay the costs of the *supersedeas*, and in *January* 1802, the Lord Chancellor assigned *Wainewright*'s bond to the Plaintiff; that in 1802 the Plaintiff commenced an action on the case against *Wainewright*, in which, by reason of a formal defect in the declaration, he was nonsuited; that in *Hilary* term 1803, the Plaintiff commenced another action against *Wainewright*, and laid his damages at 5000*l.*; that the cause came on to be tried at the *Lent* assizes for the county of *York* in 1803, when, by consent, a rule of court was drawn up, ordering that a verdict should be entered for 5000*l.* damages, but that the quantum of damages should be subject to the award of *W. L.*, to whom all matters in difference between the parties (except the bond ordered by his lordship to be assigned to the Plaintiff) were thereby referred; that the costs of the reference should be in the discretion of the arbitrator, and that the costs of *Wainewright* in the former nonsuit should be set off, and the costs in equity allowed to the Plaintiff.

The bill farther stated, that by his award, dated the 18th of *July* 1803, after noticing, that the costs of the nonsuit had been taxed at 201*l.*, and the costs in equity at 69*l.* 10*s.* 10*d.* (the balance of which costs amounting to 131*l.* 9*s.* 2*d.* the arbitrator awarded to be due from the Plaintiff to *Wainewright*,) and farther noticing that the principal sum of 150*l.* advanced by *Wainewright* to the Plaintiff, and secured by mortgage made on the 29th of *June* 1800, and all interest thereon from that day still remained due, and that

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there being no claim or matter in difference submitted to him in respect thereof, he had not taken into consideration the same, or the bond ordered by his Lordship to be assigned, the arbitrator ordered, that the cause depending between the parties, before or at the time of the submission, save the principal and interest secured by the mortgage, and the bond, should cease; and that *Wainewright* should pay to the Plaintiff the sum of 100*l.* in full for his damages together with the costs of the action, and of the reference, for the amount of which damages and costs, when taxed, first deducting the sum of 131*l.* 9*s.* 2*d.*, the Plaintiff should be at liberty to enter up judgment.

The bill farther stated, that by the effect of the award, regard being had to the circumstance that the sum of 200*l.* the principal money secured by the bond assigned to the Plaintiff remained unsatisfied, a balance was due from *Wainewright* to the Plaintiff, after giving credit to *Wainewright* for the costs of the nonsuit, and the principal money and interest due on the mortgage to the amount of 176*l.* 10*s.*, and that *Wainewright* was not entitled to make available his securities on the Plaintiff's estate; but that persisting in his legal right by virtue of the mortgage, in *July* 1803 *Wainewright* caused the estate to be put up for sale by public auction, and on the 22d of *August* following the sale was brought on, when, although the Plaintiff's solicitor attended, and made known to the persons present, and particularly to the Defendant *Rayner*, the amount of the balance which the Plaintiff claimed from *Wainewright*, yet *Rayner* became a bidder, and the premises were sold to him for the sum of 1210*l.*

The bill prayed that the sale of the said premises might be rescinded, and that it might be declared that the trust created by the said mortgage or other deed, in favor of *Wainewright*, was then determined, and that *Wainewright* might be decreed to reconvey to the Plaintiff the said estate, and to deliver up the title deeds.

The

The cause being heard on the 17th of *May* 1810, by the Master of the Rolls sitting for the Lord Chancellor, his Honor ordered the bill to be dismissed. A petition of rehearing having been presented, and the cause having been argued on a former day, the Lord Chancellor now gave judgment.

The LORD CHANCELLOR.

The assignment of the petitioning creditor's bond by the Lord Chancellor is conclusive evidence of malice.

This is the case of a person who, having superseded a commission of bankruptcy, established to the satisfaction of the Court that the commission was malicious; in which event the Chancellor ought to direct an assignment of the bond: recollecting, however, that the party has a different, and in some respects a better, remedy, by action on the case. Where the bond is assigned, the obligor has no defence (a); the commission must be taken to be malicious, but the damages cannot exceed the penalty of the bond: in the action on the case the Plaintiff must prove malice, but the damages are unlimited.

Wainewright having caused the mortgaged estate to be offered for sale, the Plaintiff's solicitor attended the auction, representing that *Wainewright*'s claim was satisfied, and that he had no right of sale. The Plaintiff states the satisfaction of the claim thus: that the award ascertains his demand exclusive of the bond; the bond entitles him to 200*l.*, and that sum added to the amount settled by the award, is an extinction of *Wainewright*'s claim in respect of the mortgage. *Wainewright* insists, (and the purchaser buys on that representation,) that a Court of Equity will not permit the Plaintiff to bring an action on the case, and another action on the bond; that in the action on the case, the party submits to the jury whether he is entitled to less or to more than 200*l.*; that in the action on the bond he decides that his claim is neither more nor less than the penalty

(a) Ex parte *Fletcher*, 1 *Rose*, 454. Ex parte *Rimene*, 14 *Ves.* 600. Ex parte *Lane*, 11 *Ves.* 416.

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of 200*l.*; and that he cannot have that penalty in addition to what the jury say he is entitled to recover. The Plaintiff contends that the meaning of the reference was, that the arbitrator should decide, not the total amount of damages, but what ought to be paid omitting the bond, and leaving the benefit of that to the obligee. The Master of the Rolls thought the construction of *Wainewright* and the purchaser right; upon the principle that the party having brought an action which was a waiver of the bond, if the meaning of the agreement was that the action should be considered as supplemental to the relief to be obtained by enforcing the bond, it was incumbent on him to show that the agreement had that meaning and no other: the action being *prima facie* a waiver of the right to sue on the bond, (and I take it unquestionably to be a waiver,) if that right was to be set up by an exposition of an award, the terms of the award must be too clear to be misunderstood. I am of the same opinion. It is a hard case, and I should not have made this award, but I think the decree right. There can be no doubt that if in an action on the case, the jury give less damages than 200*l.*, the remedy on the bond is barred.

Decree affirmed without costs.

Jan. 28.

GITTINS *v.* STEELE.

The general personal estate exempted from the payment of a particular legacy.

In the event of the deficiency of a particular fund appropriated to the satisfaction of certain bequests, the Court, on the question of the exemption of the general personal estate, cannot advert to the fact of a sale of part of the testator's property subsequent to the will, by which the particular fund has become insufficient.

THE question in this cause arose on the will of *Evan Evans*, dated 22d *May* 1809, to the following effect:

"First,

"First, I do order and direct, that all my just debts, funeral expenses, and the charges of proving this my will, shall be paid and satisfied by my executors, hereinafter named; also, I give and bequeath the sum of 7000*l.* unto and equally between all my cousins, (describing them); and I do hereby charge all my freehold and leasehold messuages or tenements, lands and hereditaments, with the payment of the said sum of 7000*l.*" The testator then bequeathed to *J. Osborn*, *J. Steele*, and *W. Spencer*, upon certain trusts, two sums of 8000*l.* and 2000*l.* 3 *per cent.* stock, then standing in his name; and after giving various pecuniary legacies out of his residuary estate thereinafter mentioned, he gave and devised to *Osborn*, *Steele*, and *Spencer*, their heirs, &c. all his freehold and leasehold messuages, lands, hereditaments, &c. upon trust to sell and dispose of them; and as to the monies arising by the sale, and the rents and profits, in trust to pay all his just debts and funeral expenses, the legacy or sum of 7000*l.* and the expenses of the sale; and as to the residue, in trust as after mentioned; and proceeded in the following words: "All my monies and securities for money, stock in trade, and the residue of my personal estate and effects whatsoever and wheresoever, and of what nature or kind soever, (not before disposed of,)" I give, &c. to *Osborn*, *Steele*, and *Spencer*, their executors, &c. "upon trust to sell and dispose of the stock in trade, &c., and out of the money to arise from the sale, and the other monies and securities for money, to pay the legacies of 8000*l.* stock and 2000*l.* stock, and the several charitable donations and other legacies hereinbefore mentioned, (except the legacy of 7000*l.*, which is to be considered as a charge on and paid out of the monies arising by sale of my said freehold and leasehold estates); and then as to, for, and concerning as well the residue of the monies arising by sale of my said freehold and leasehold estates, as the residue of the monies arising by sale of my said stock in trade and personal estate, and the residue of my other monies and securities for money, upon trust to place out the

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the same on government or real security, during the lives of *T. E.*, *J. O.*, &c., and the survivor, in trust out of the dividends to pay certain weekly sums before bequeathed; and as to the then remainder of the dividends, interest, and produce of such residuary estate, in trust to pay the same unto and equally between the several persons who, by virtue of this my will, shall become entitled to any part or share of the several legacies or sums of 7000*l.*, 8000*l.* stock, and 2000*l.* stock before mentioned; and from and after the several deceases of *T. E.*, *J. O.*, &c., as to, for, and concerning such residuary estate, and the unapplied dividends, interest, and produce thereof, in trust to pay, divide, and distribute the same unto and equally between the said several persons, who, by virtue of this my will, shall become entitled to any part or share of the said several legacies or sums of 7000*l.*, 8000*l.* stock, and 2000*l.* stock." The testator appointed *Osborn*, *Steele*, and *Spencer* his executors.

After making his will, the testator sold some freehold and leasehold estates, and died in *May* 1811.

The bill prayed that the will might be established and the trusts executed.

By his report the Master stated that the money produced by the sale of the testator's freehold and leasehold estates was insufficient to satisfy the legacy of 7000*l.*; and that the testator having charged that legacy on his freehold and leasehold estates, and excepted it in directing payment of legacies out of his personal estate, he had not allowed to the executors their payments on account of that legacy.

The cause having come on for farther directions, the Vice-Chancellor, by an order, dated 12th *May* 1817, declared that the legacy of 7000*l.* was a charge upon the general estate of the testator, and the produce of his free-

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hold and leasehold estates; and ordered that the sum of 6112*l.* 14*s.* 6*d.*, paid by the executors on account of the said legacy, should be allowed to them as a proper payment.

Some of the residuary legatees having presented a petition of appeal from such part of the order as declared the legacy of 7000*l.* a charge upon the general estate of the testator, praying that such legacy may be declared to be a charge upon the testator's freehold and leasehold estates only, the cause now came on to be argued.

Mr. *Wetherell* and Mr. *Cross* for the Appellants.

The testator, after expressly charging the legacy of 7000*l.* on his freehold and leasehold estates, expressly exempts the rest of his property. That clause is clear and decisive; nor is any passage in the will inconsistent with it, or indicative of an intention that the legacy should be payable out of the personal estate. The deficiency in the fund which the testator had provided for the payment of the legacy, was the consequence of his own act, the sale of freehold and leasehold estates. The cases of *Bootle* v. *Blundell* (*a*), *Hancox* v. *Abbey* (*b*), and *Burton* v. *Knowlton* (*c*), decide the question.

Mr. *Bell*, Mr. *Owen*, Mr. *Horne*, Mr. *Trower*, and Mr. *Roupell*, for different respondents.

The only question in the cases cited is, what is sufficient indication of the testator's intention to exempt his personal estate from payment of debts and legacies? That is not the question in this case. This testator has distributed his estate into two funds; one, consisting of freehold and leasehold estates, he constitutes the primary fund

(*a*) 1 *Mer.* 193. (*b*) 11 *Ves.* 179. (*c*) 3 *Ves.* 107.

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for the payment of his debts, funeral expenses, and the legacy of 7000*l.*; the other, consisting of his personalty, with the exception of the leasehold estates, he constitutes the primary fund for the payment of all other legacies; and then, contemplating a surplus of each fund, he consolidates those two residues, and disposes of the whole by a general residuary clause. His purpose in the division of the estate into two funds, was to appropriate each to the payment of certain charges, and in the event of a deficiency of either or both of the funds, to prevent contribution till after satisfaction of the charges specifically imposed on each; but it could not be his intention to exempt the residue of one fund from supplying the deficiency of the other. No benefit was designed for the residuary legatees, till after payment of the specific and pecuniary legacies. Residue, *ex vi termini*, denotes what remains after satisfaction of debts and legacies.

The LORD CHANCELLOR.

It seems to me impossible to support this decision; and I feel the less regret in differing from a judgment which an experience of more than forty years has enabled me to appreciate, in a question on which all the great men who have presided in this court have differed from each other.

For the purpose of collecting the intention, every part of the will must be considered.

The old law was, (I regret that it is not law still) (*a*), that the personal estate could not be exempted from the payment of debts and legacies without express words. That yielded to the doctrine of demonstration clear, and declaration plain, which is such, that in any particular case, no man knows how it will apply. We have now reached the sound rule, that for the purpose of collecting the intention, every part of the will must be considered. That rule was first established by the great Judge whom we have just lost, the late Master of the Rolls, and was confirmed by myself in *Bootle* v. *Blundell*.

(*a*) *Watson* v. *Brickwood*, 9 *Ves.* 453.

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The present question is, not whether the personal estate is to be exempted from payment of debts and legacies, but, regard being had to all the parts of the will, the bequest over, and the rules of law, whether a particular legacy, (whatever may be the case with other legacies, or with debts,) is payable only out of the freehold and leasehold estates, or whether it is also payable out of the general personal estate, the charge on the freehold and leasehold estates being designed as an additional security. From the payment of debts the personal estate can be exempted only by the substitution of a sufficient fund, and it continues subject to the claims of creditors in the event of a deficiency in the fund provided. But legatees and devisees, as volunteers, are not entitled to resort to any other than the particular fund which the testator, or the law, has assigned.

His Lordship then proceeded to comment minutely on the clauses of the will, and after remarking that the persons named as executors were those who in the character of trustees, in every clause of the will, whether with reference to freehold or personal estate, were to execute trusts; that the question must be decided on the same principle as if all the persons entitled to the residuary estate were strangers; and that the latter words of the will would, as latter words, control the former; concluded as follows.

Entertaining no doubt that the intention of the testator has been frustrated by a subsequent sale of a part of his estates, I am not authorized to advert to that fact as affecting the construction of the will. I am bound, as a judge, to assume that the testator supposed that he should leave at his decease freehold and leasehold estates sufficient for the payment of the legacy of 7000*l.*; and I protest against being understood to give my judgment on the ground of the subsequent sale. (*a*) My duty is to apply the funds

(*a*) See *Richardson* v. *Edmonds*, 7 *T. R.* 635 *Standen* v. *Standen*, 2 *Ves. jun.* 593. *Bootle* v. *Blundell*.

which

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which, at his death, are applicable, by the operation of the will to the payment of this legacy. If they are insufficient, the Court, whatever may be the hardship of the case, cannot supply other funds.

I am clearly of opinion that the general personal estate is not subject to the legacy of 7000*l.* The order therefore must be varied, but I shall not give costs.

Jan. 28, 29.

Ex parte FLINT.

In the Matter of G. and S. ROBINSON, Bankrupts.

A creditor of a partnership, having made farther advances on the security of a bill of exchange, deposited with him for that purpose by the partners, and having undertaken to receive the amount when due, and return the surplus, the bill having been dishonored and remaining in his hands unpaid, is not entitled, on the bankruptcy of the partners, to set off his prior advances against a demand by the assignees for the bill.

THE petition stated, that in the year 1815 the petitioner, on the security of goods deposited with him by *George Robinson* and *Samuel Robinson* booksellers, accepted bills of exchange for their accomodation, and after payment of the acceptances and sale of the goods, a considerable balance remained due to him; that in *September* or *October* 1816 *G.* and *S. Robinson* applied to the petitioner to discount a bill of exchange dated 15th *May* 1816, for 650*l.* payable six months after date; and they, having endorsed the bill in their joint names, and deposited it with him, the petitioner advanced to them 39*l.*, and was guarantee for the payment by them of 15*l.*, and accepted a bill of exchange on their account for 116*l*; that the bill for 650*l.* was dishonored when due, the drawer, acceptor, and indorsers, having all become bankrupt or insolvent, and is still unpaid, and a sum of 880*l.* is due to the petitioner from *G.* and *S. Robinson* for money lent; that in *January* 1817 a commission of bankruptcy was issued against *G.* and *S. Robinson*; and that the bill remaining in the hands of the petitioner, in *April* last an action of trover was brought against him by their assignees to recover it, when on the evidence of *George Robinson*, (who having obtained his certificate was examined, and stated that

that the bill was left with the petitioner, not on the general account between the petitioner and the bankrupts, but to secure only the advance then made in money, and the bill of exchange for 116*l.*) a verdict passed in favour of the assignees for the sum of 495*l.*, being the amount of the bill, deducting 155*l.* The petition, insisting that such verdict ought not to bind the petitioner, and that he was in equity entitled to retain the bill against the assignees until he should be fully paid what was due to him on the balance of the account between him and the bankrupts, and to set off that balance against the amount of the bill, prayed, that the assignees might be restrained from any farther proceedings on the verdict, and that the petitioner might be at liberty to retain the bill of exchange for 650*l.*, towards security for the money due to him from the bankrupts' estate, and as an indemnity against the engagements which he was under for them.

By his affidavit filed against the petition, *George Robinson* stated that one *Jackson* the acceptor, having been declared bankrupt before the bill became due, *Robinson* applied to the petitioner for the bill, in order that an arrangement might be made with *Jackson*'s nephew, when the petitioner declared that he had borrowed 300*l.* or 400*l.* on the bill, and could not release it before *January*; *George Robinson* farther stated that the bill was left with the petitioner, not on the general account between him and *G.* and *S. Robinson*, but only for the specific purpose of securing such advances as he should make on the security of the bill, (which in cash and by acceptance amounted to the sum of 155*l.* and no more,) and it was understood and agreed between *George Robinson* and the petitioner that in case he assisted *G.* and *S. Robinson* with a sum of 120*l.*, or thereabout, which they then required, the petitioner should receive the whole amount of the bill when due, and retain it in his hands until the month of *January* 1817, when it would be wanted by *G.* and *S. Robinson* to pay certain promissory notes issued by them.

Sir

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Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Roupell*, for the petition.

The bankrupts being indebted to the petitioner, deposit this bill with him as a security for farther advances. After the satisfaction of that particular purpose, had no bankruptcy intervened, they might, we admit, have recovered the bill in an action at law; but the bankruptcy brings the case within the operation of the statute 5 *G.* 2. *c.* 30. *s.* 28. By the agreement, the petitioner was not to return the bill, but to receive the amount, and retaining the whole in his hands till *January* 1817, was then to pay to the bankrupts the difference between that amount and the total of his advances on the security of the bill. Failing to make that payment, he became indebted to them, under the agreement, to the extent of the difference. Against that debt he is entitled to set off the sum previously due to him from them. These circumstances constitute a case of "mutual credit" within the terms of the act, *Smith* v. *Hodson* (*a*), *Atkinson* v. *Elliott* (*b*), *Olive* v. *Smith*. (*c*) The demand of the assignees, though in the form of an action of trover, is in effect for the value of the bill.

Mr. *Hart* for the assignees.

The question has been decided by a competent tribunal. On the subject of set off, the statute gives to the courts of law an equitable jurisdiction. There are not two species of set off, one at law, and one in equity. This is a case not of mutual credit, but of bailment of a chattel, subject to a lien on the part of the bailee, with an undertaking to return the chattel, on payment of the money to secure which it was deposited. No credit was given by the bankrupts. The form of the action is a consequence of the

(*a*) 4 *T. R.* 211. (*b*) 7 *T. R.* 378.
(*c*) 5 *Taunt.* 56.; and see *Staniforth* v. *Fellowes*, 1 *Marsh.* 184. *Oughterlony* v. *Easterby*, 4 *Taunt.* 888.

nature

nature of the contract, and affords a material objection to the claim of set-off. The detention of the bill is fraudulent; and the Court will not assist a claim founded in a gross breach of faith.

Sir *S. Romilly*, in reply.

I admit that the question has been decided at law, and that there is no difference between set-off at law, and set-off in equity; but this Court is not bound by the opinion of the Court of Common Pleas. An engagement to pay money is not necessary to constitute a case of mutual credit within the statute; for that purpose, by repeated decisions, bailment is sufficient. *Ex parte Deeze* (a), *French* v. *Fenn.* (b)

The LORD CHANCELLOR. *Jan.* 29.

It is clear that the petitioner might in the first instance have proceeded by petition in bankruptcy, praying that an account should be taken, and that the bill for 650*l.* should form an item in the account. He thinks proper to pursue another course; to make defence to the action, and try the question in the Court of Common Pleas. It is true, the only witness examined at the trial is one of the bankrupts; but that was the mode in which the petitioner chose that the question should be tried. Instead of coming here originally on petition and affidavit, he took his chance first at law. The judge who heard the cause, entertained a decided opinion that the petitioner was not entitled to the benefit of the statute. On an application for a new trial, the Court thought the case so clear that they refused a rule to shew cause. A writ of error is then brought; and in that stage the petitioner comes here. He comes to this Court as having a legal, or an equitable jurisdiction, or both. There is no ground for saying that the Court has an equitable jurisdiction, unless it arises out of the statute;

The doctrine of set-off and mutual credit under the statute, is the same at law and in equity.

(a) 1 *Atk.* 228. (b) *Cooke, B. L.* 588.

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Ex parte FLINT.

statute; and it is admitted, (it could not be denied,) that if the petitioner could avail himself of the statute by petition, he had a defence at law. The ground of his application then is this; that the judge at *Nisi Prius*, and the Court of Common Pleas, have mistaken the law; and that the Chancellor sitting in Bankruptcy, ought to interfere, if he should understand the statute in a sense contrary to that which they have adopted. I take it now to be a principle, that under such circumstances, where the law has been distinctly stated, I must see most clearly that it has been mis-stated, before I can relieve persons who think proper first to try another tribunal.

It has long been settled, that the statute authorizes the bringing into mutual account a great variety of items, which could not be made the subject of set-off; a doctrine which seems founded on notions of natural equity, and has been carried as far as construction can well carry it. The Judge at *Nisi Prius*, and the Court afterwards, thought that the petitioner received this bill under a contract of such a nature, that it would be contrary to natural equity for him to make that use which he now seeks to make of it, and to avail himself of the statute. On reading the affidavit of the petitioner and of the bankrupt, (whether the latter brings forward the evidence which appeared at the trial is not material to the present purpose,) I am of opinion that the petitioner had no right to consider this bill as an item of mutual credit, to be brought into the account; and that the use which he seeks to make of it is contrary to natural equity.

I shall therefore dismiss the petition; and the petitioner having come here after a failure at law, I shall dismiss it with costs.

1818.

ROLLS.
Jan. 29.

HAMMOND *v.* NEAME.

Under a bequest of stock, in trust to pay the dividends to *M. H. H.*, the niece of the testator, "for and towards the maintenance, education, and bringing up of all and every the child and children of the said *M. H. H.* until he, she, or they shall attain twenty-one," then to transfer the principal equally among the children, with a bequest over in default of such issue, to the nephews and nieces of the testator living at the death of *M. H. H.*: The dividends are payable to *M. H. H.*, although she has no child.

BY his will, dated 4th *January* 1812, *Austin Neame* bequeathed to *Richard Gibbs*, his executors, administrators, and assigns, the sum of 3400*l.* 3 per cent. reduced annuities, upon trust, "to pay and apply the yearly interest and dividends thereof, as the same should become due and payable, into the hands of his the said testator's niece, and his the said *R. Gibbs'* daughter, *Mary Hills Hammond*, for and towards the maintenance, education, and bringing up of all and every the child and children of the said *M. H. Hammond*, until he, she, or they shall attain the age of twenty-one years, and when and so soon as he, she, or they shall have attained that age, then upon further trust to pay, assign, and transfer the said sum of 3400*l.* unto and equally among all and every the child and children of *M. H. Hammond*, equally to be divided between them, share and share alike, and to their several and respective executors, administrators, and assigns; and in default of such issue, upon trust to assign and transfer the said sum of 3400*l.* unto all and every his the said testator's nephews and nieces, the children of his the said testator's brothers; that is to say, the children of his brother *John Neame*, and the children of his brother *Thomas Neame* the elder, living at the decease of *M. H. Hammond*, and the child or children of such one or more of them as should be dead, equally to be divided between them, share and share alike, and to their several and respective executors, administrators, and assigns: provided always, and he thereby declared, that the first half-year's interest on the said sum of 3400*l.* which should become due next after his decease, should go, and he thereby bequeathed the same, unto his nephew and residuary legatee *Thomas Neame* the younger, his executors, administrators, and assigns."

 The

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HAMMOND v. NEAME.

The testator died on the 1st of *December* 1813. The Plaintiff, *Mary Hills Hammond*, not having any children, claimed to be entitled to the dividends accrued on the sum of 3400*l.* stock since the decease of the testator, (except the first half-yearly dividend payable after his decease,) and also to such as shall accrue during her life, or till she shall have a child which shall attain twenty-one.

The bill prayed a declaration of the rights of *M. H. Hammond*, payment of past dividends, and transfer of the stock into the name of *R. Gibbs*, the trustee, on the trusts of the will.

Mr. *Hart* and Mr. *Roupell*, for the Plaintiff.

This legacy is not left in the hands of the executors to be applied or not applied by them, but is an immediate gift at law in favour of *Gibbs*, separated from the bulk of the estate; a gift upon an express trust to pay the dividends to the Plaintiff. She, and not her children, of whom none are in existence, is the object of the testator's bounty; but that bounty is connected with an obligation imposed on her of maintaining her children out of the funds. Upon the construction that the Plaintiff is not entitled till the birth of a child, the gift, which is in terms absolute and immediate, becomes contingent, and may be suspended during her life. In the interval the dividends would be payable to the residuary legatee; an implied benefit inconsistent with the express gift to him of the first half-year's dividend. The bequest over is not to take effect till her death. The testator believed therefore, that during her life the dividends were disposed of; and he has given them to no person but her. A legacy bequeathed for a special purpose, on failure of the purpose, without default in the legatee, as by the death or lunacy of an infant to whom a sum is bequeathed for an apprentice fee, becomes absolute. *Barlow* v. *Grant* (a), *Nevill* v. *Nevill* (b), *Barton* v. *Cooke*. (c)

(a) 1 *Vern.* 254. (b) 2 *Vern.* 431. (c) 5 *Ves.* 461.

Mr. *Wingfield*, for the nephews and nieces of the testator.

The testator has specified a particular purpose for which the dividends are to be paid into the hands of the Plaintiff, and she is not entitled to receive them, till they can be applied for that purpose. Had he designed them for her own benefit, he would not have expressed that he gave them for the maintenance and education of her children. The birth of children, though none were born at the date of the will, might probably be expected before his death. The first half-year's dividends are given to the residuary legatee, whether the Plaintiff had or had not children; his title to the subsequent dividends is contingent on the event of her having no children. The cases cited are not applicable. A legacy for putting the legatee apprentice is a benefit to the legatee: to assume that a benefit was designed to the Plaintiff, is an assumption of the question. The bequest contains no words marking the distinction, that the dividends shall be paid to the niece for her own benefit till the birth of children, and after that event for the benefit of the children.

Sir *Arthur Pigott*, Mr. *Fonblanque*, and Mr. *Boteler*, for formal parties.

Mr. *Hart*, in reply,

A legacy to be paid to the father for the maintenance of a child, is a benefit to the father, *Andrews* v. *Partington*. (*a*) In a recent case before the late Master of the Rolls, a father was held entitled to a legacy given to him for placing out his son as an apprentice, although at the testator's death, the son had passed his apprenticeship.

The MASTER *of the* ROLLS.

The stock is given to *Gibbs* as a mere trustee. If the children were intended to be the only cestuis que trust, it

(*a*) 3 *Bro. C. C.* 60.

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seems needless to direct payment by the trustee to a third person. In terms this is an immediate bequest of the dividends to the testator's niece; and it occurs in a will containing many bequests to nephews and nieces, but none other for her. The words are express to pay the dividends into her hands. If the birth of children is necessary to entitle her to payment, the legacy is conditional; but the terms are absolute. The payment is to be made into her hands; the purpose of the payment is to enable her to provide for the maintenance of the children; from her they are to derive it; by her it is to be apportioned and distributed. The children are no direct objects of bounty, but only the occasion of bounty to the niece. It is a gift to a parent who, as mother, is under no legal obligation to support her children.

The testator, her uncle, must have known that she had no children. Had he intended that she should take nothing till the birth of children, would he not, providing for the event of her death without issue, have made a bequest of the accumulated dividends? He has expressly provided for that event, and bequeathed the principal only.

The bequest of the first half-year's dividend to the residuary legatee, affords a farther argument in support of the same conclusion. The intention certainly might be to secure to him those dividends, in both events of there being or not being children; but if the testator meant that he should continue to receive the dividends till the birth of children, he would then have been led to express that meaning.

I am of opinion, therefore, that the Plaintiff *M. H. Hammond* is entitled to receive these dividends.

The costs of the Bank, paid out of the capital of a legacy, for the security of which they were made parties.

The costs of all parties, except the Bank, must be paid out of the general personal estate; the costs of the Bank, who are made parties for the security of the legacy, must be paid out of the capital of the legacy.

1818.

BAILEY *v.* WRIGHT.

Jan. 31.

Under a limitation in a marriage-settlement of the wife's property, in default of her appointment, for her next of kin or personal representative, the husband, taking a prior partial interest, is not entitled.

THIS cause having come on by appeal from the judgment of the Master of the Rolls (*a*), the Lord Chancellor confirmed the decree; remarking, that the nature of the trust of the sum of 200*l.* bore most strongly on the construction, and that the husband could not correspond to the description of next of kin or personal representative in the settlement, because the benefit which he claimed in that character, was one to arise after he had recovered all that was given to him as husband.

(*a*) 18 *Ves.* 49.

ROGERSON *v.* WHITTINGTON.

Feb. 5.

By the order directing a party to be examined as a witness on the trial of an issue, no objection is waived, except that which arises from his being a party in the cause.

AN issue *devisavit vel non*, having been directed in this case, and the time appointed for the trial having expired, Sir *Samuel Romilly* moved for an order that it might now be tried, and that the Plaintiff might be examined as a witness.

Mr. *Bell*, against the motion.

Two questions are to be decided by this issue: whether the supposed testator was competent to execute a will; and whether the will is forged. The Plaintiff is the person suspected of forgery. He is at law an incompetent witness, as Plaintiff in the cause, and as a legatee. The Court will not prevent the heir from trying the question with all the advantages which the law confers on him.

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ROGERSON v. WHITTINGTON.

The LORD CHANCELLOR.

When the Court directs a party to be examined as a witness, no objection is waived except that which arises from his being a party in the cause. I cannot attend to the suggestion of forgery; but I am not inclined to deprive the heir of his legal advantage. The issue must be tried on payment of costs, and the Defendant must not object to the examination of *Rogerson* on the ground of his being Plaintiff in this cause.

Feb. 5.

CRAWSHAY *v.* COLLINS.

A cause having been referred to arbitration, under an order by consent, the Court will not make an order on the arbitrators to proceed.

The parties having proceeded under an order made by consent for referring a cause to arbitration, whether it is competent to either to withdraw, *quære.*

ON the 1st of *March* 1817, an order was made by consent, that all matters in difference between the parties in this cause, should be referred to arbitration. After seventeen meetings had been held by the arbitrators, and the counsel for the Plaintiffs had announced that he had finished his case; at a subsequent meeting, a claim was advanced on the part of the assignees under a second commission of bankruptcy issued against *Mark Noble* (the Plaintiffs being his assignees under the first commission), when the counsel for the Defendant *Collins* declaring that he would not assume the responsibility of advising his client to proceed in the reference unless some arrangement was made relative to that claim, the meeting was dissolved. *Collins* being desirous that the proceedings under the reference should be continued, but the Plaintiffs insisting that he had abandoned, and refusing to renew, it, he now moved that the arbitrators might proceed in the reference.

The Solicitor-General, Mr. *Roupell,* and Mr. *Beames,* for the motion.

The case is brought before the Court at the request of the arbitrators, in order to decide whether the transaction amounted

amounted to a termination of their authority. Even conceding that it is competent to a party to withdraw from a proceeding under an order of the Court, at least he can withdraw only by formal notification, an express *retraxit.* No such step has been taken here; *Collins* positively swears that he never meant that the arbitration should cease.

The LORD CHANCELLOR.

The question whether in fact *Collins* terminated this arbitration, assumes that he had a power so to do; the other party must have a like power; then if they choose to terminate it, how are you to proceed? If it is argued whether under an order of Court referring matters to arbitration, either party can determine the reference, that is a question of law which must be decided; but I have nothing to do with the question of fact.

For the motion.

This is not a reference by agreement, of a subject not in litigation; but the progress of a suit advanced towards judgment, is intercepted, for the purpose of transferring the question, under an order of the Court, to a tribunal chosen by the parties. An order obtained by consent cannot, in general, be discharged at the instance of either party without the consent of the other.

Sir *S. Romilly*, Mr. *Hart*, and Mr. *Stephen*, against the motion.

It is not clear whether the motion (in either case unprecedented) is, that the arbitrators may be at liberty, or that they may be ordered, to proceed. An application for the first purpose is nugatory; and an order to proceed is unnecessary, if this authority is not determined, and if it is cannot be made without consent. It is for the arbitrators to decide whether their authority is, or is not, determined; they

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they must exercise their discretion of proceeding *ex parte* (*a*), but are not entitled to the opinion of the Court.

The Solicitor-General, in reply.

The Court possesses jurisdiction to direct the proceedings of persons who have undertaken the office of judge, to which it has appointed them. At law, the parties may revoke an agreement that the submission to refer should be made a rule of Court; but a submission which has been made a rule of Court, it would be a contempt to revoke. (*b*) In no case has it been held that parties, having actually proceeded with an arbitration under an order obtained by consent, may retract that consent, and withdraw from the control of the Court.

The LORD CHANCELLOR.

The object of this motion is to ascertain to the satisfaction of the arbitrators, whether *Collins* has terminated this reference. Supposing that I were to decide that he did not terminate it, the very hypothesis on which you come here to ascertain that fact, entitles the Plaintiff to say, if he is dissatisfied with my judgment, that he will determine it.

With regard to the question, whether the parties are at liberty to withdraw, in many cases it has been argued that arbitrators under an order of the Court, stand in the place of the Master; but in what former instance has it ever been contended that this Court can make an order on them to proceed? If they have proceeded and made their award, much controversy has arisen whether exceptions may be taken to the award; and on that subject it may be sufficient to refer to the case of *Dick* v. *Milligan* (*c*); but an order on arbitrators to proceed is what I never before heard of.

(*a*) *Wood* v. *Leake*, 12 *Ves.* 412. (*b*) *Milne* v. *Gratrix*, 7 *East*, 608.
(*c*) 4 *Bro. C. C.* 117. 536. 2 *Ves. jun.* 23.

The

The short way would be for them to give notice to the Plaintiff that they will proceed, unless he applies to the Court to stay proceedings; but I wish the arbitrators to consider what must be the state of the Court, if whenever any difficulty arises before them, they are to come here and take its opinion.

Motion refused.

Sir MARK WOOD, Bart. *v.* EDMUND GRIFFITH. *Feb.* 10.11.12.

The specific performance of an award may be compelled in equity, on the principle that the award only ascertains the terms of a previous agreement between the parties: and although the illegality of the acts of which it directs the execution will afford a ground for refusing to decree the performance, the Court, considering an award as the decision of judges chosen by the parties, will not examine whether it is unreasonable.

BY articles of agreement, dated 15th *November* 1797, *Michael Hicks Beach*, with the consent of other persons interested, agreed to sell to *Edmund Griffith*, for 23,000*l.*, an estate called the *East Mark* estate; and by an indorsement on the articles, Mr. *Griffith* declared that the purchase was made for the equal benefit of Sir *Mark Wood* and himself. In the same year possession was taken under the contract, and 5000*l.* were paid by Sir *Mark Wood*, on account of the purchase-money: in 1799 a farther sum of 2000*l.* was paid by him; and in 1800 a lease of the estate was executed by Sir *Mark Wood* and *Griffith* to *George Webb Hall*, for a term of twenty-one years, at a rent of 1170*l.* On the 24th of *January* 1806, *Beach* and the other vendors filed a bill in the Court of Exchequer against Sir *Mark Wood*, *Griffith*, and *Hall*, praying the specific performance of the contract for the purchase of the estate; and in that cause the Court directed the usual reference to the Deputy Remembrancer to inquire whether the Plaintiffs could make a good title. Disputes having arisen between Sir *Mark Wood* and *Griffith* concerning the management of the estate, and their respective rights and interests therein, and various suits having been instituted by them against each other, on the 4th of *July* 1806, by an order

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order made in a cause then depending between them in the Court of King's Bench, all matters in difference between the parties were referred to arbitration.

By his award, dated the 9th of *March* 1809, the arbitrator, after declaring, among other things, that a sum of 1250*l.* was due from Mr. *Griffith* to Sir *Mark Wood*, and directing payment thereof on the 15th of *June* next, unless it should have been previously paid, out of *Griffith's* share of "the purchase-money to arise by the sale of the said estate thereinafter directed to be sold," proceeded in the following words:

"I further declare and award, that all the right, title, and interest of the said Sir *Mark Wood* and *Edmund Griffith* in the said *East Mark* estate ought to be forthwith sold, and that the said Sir *Mark Wood* and *Edmund Griffith* are to be equally interested in and liable to all benefit or loss which may ultimately arise or happen from such sale. And inasmuch as the said *Michael Hicks Beach* and *Henrietta Maria* his wife, *Richard Messiter*, and *Joseph Pitt* have, by their bill filed in the Court of Exchequer as hereinbefore mentioned, prayed that in default of immediate payment by the said Sir *Mark Wood* and *Edmund Griffith* of what should be found due to the said *Richard Messiter* and *Joseph Pitt*, for principal and interest on the residue of the said sum of 23,000*l.*, the said estate, or a competent part thereof, might be immediately sold under the decree of the said Court, to raise the amount of what should be found due: I do further award and direct, that the said Sir *Mark Wood* do, some time in the course of the first six days of *Easter* term next, or so soon afterwards as the said Court shall think fit to hear the application, cause a motion to be made, praying the said Court to direct a sale of the said *East Mark* estate in one lot, by public auction, before the Deputy Remembrancer, at such time as the said Court shall think proper under the circumstances of the case;

case; but with liberty for the said Sir *Mark Wood* and *Edmund Griffith* respectively to bid for the same at such sale. And I direct the said *Edmund Griffith* to consent to such application; or, in case the said Plaintiffs in the said suit shall in the mean time apply to the said Court to direct such sale, I award and direct the said Sir *Mark Wood* and *Edmund Griffith* respectively to consent thereto; and in either of the said cases, I direct them the said Sir *Mark Wood* and *Edmund Griffith* respectively to consent, that if he shall be declared the purchaser of the said premises at such sale, he will accept such title thereto as the said *Michael Hicks Beach* and *Henrietta Maria* his wife, *Richard Messiter*, and *Joseph Pitt*, shall be able to make thereto; and that he shall pay his purchase-money and complete his purchase forthwith."

The arbitrator then directed the distribution of the purchase-money, in case the Court of Exchequer should order such sale, first in satisfaction of the sum due to the vendors, then of the advances made by Sir *Mark Wood*, and afterwards in equal moieties between Sir *Mark Wood* and *Griffith*, and continued as follows:

" But in case the said Court of Exchequer upon such application as aforesaid, shall not think fit to direct a sale of the said estate, then I direct that they the said Sir *Mark Wood* and *Edmund Griffith* shall, within fourteen days after the said Court shall have signified such its determination thereon, join in giving a proper authority in writing, for Messrs. *Hoggart* and *Phillips* of *Broad-street*, in the city of *London*, auctioneers, to sell all the estate, right, title, and interest of them the said Sir *Mark Wood* and *Edmund Griffith* to and in the said premises by public auction, within six months after such authority shall be given, at which sale they the said Sir *Mark Wood* and *Edmund Griffith* respectively are to be at liberty to be bidders: and the monies for which such estate, right, title, and interest to and in the said

premises

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premises shall be sold at such sale, shall, after payment of all incidental expences, be applied in the same manner as is hereinbefore directed respecting the surplus of the purchase money of the said estate, if sold under the directions of the Court of Exchequer, after satisfying the payments which the said Court shall direct to be made thereout as aforesaid. And in either of the cases aforesaid, I award and direct that they the said Sir *Mark Wood* and *Edmund Griffith* respectively do execute all proper and necessary conveyances of the said premises, and every part thereof, and of their respective rights and interests in and to the same, to the purchaser or purchasers thereof, and do all acts necessary to carry such sale into effect. But if in either of the cases aforesaid it shall appear, that the said *Michael Hicks Beach*, and *Henrietta Maria* his wife, *Richard Messiter*, and *Joseph Pitt*, cannot make a good and sufficient title to the said premises, or any part thereof, or if for any other reason the said contract for the sale of the said estate, as between the said last-mentioned parties and the said Sir *Mark Wood* and *Edmund Griffith*, cannot be carried into execution, then, inasmuch as the said *Michael Hicks Beach*, and *Henrietta Maria* his wife, and their trustees, are not parties to this reference, it does not appear to me that I can make any specific award concerning the said *East Mark* estate: But I award and direct, that if upon the completion of any sale of the said estate, or of the interest of the said Sir *Mark Wood* and *Edmund Griffith* therein, as hereinbefore directed, or upon the vacating or rescinding the said purchase contract, for want of a good title, or otherwise as aforesaid, the said Sir *Mark Wood* shall not receive from the net produce of such sale, or from the said *M. H. Beach*, or the said trustees, or out of the said Court of Exchequer, or otherwise, the whole of the said sums of 5000*l.*, and 2000*l.*, so advanced by him as aforesaid, with such interest as aforesaid, then and in that case the said *Edmund Griffith* shall make good and pay to the said Sir *Mark Wood* one moiety of the deficiency of the said two

 principal

principal sums and interest; and if in either of the said last-mentioned cases, the sum or sums to be received by the said Sir *Mark Wood* shall exceed the said sums of 5000*l.*, and 2000*l.*, and interest as aforesaid, then I award and direct that the said *Edmund Griffith* shall be entitled to one moiety of such excess, and the said Sir *Mark Wood* to the other part thereof."

Within the first six days of *Easter* term after the date of the award, Sir *Mark Wood* accordingly, with the consent of *Griffith*, moved in the cause depending in the Exchequer, that a sale might be directed of the *East Mark* estate; but the Plaintiffs in the Exchequer opposing the motion, it was, on the 12th of *February* 1811, refused.

Within fourteen days after the refusal of that application Sir *Mark Wood* gave written notice to *Griffith* of his readiness to join in authorizing a sale of all the estate, right, title, and interest of himself and *Griffith* in the *East Mark* estate, pursuant to the award, and tendered to *Griffith* for his signature, which he refused, an authority to the auctioneers for making such sale.

The bill, filed by Sir *Mark Wood*, stating these facts, prayed that *Griffith* might be directed specifically to perform the award so far as relates to the sale of all the estate, right, title, and interest of the Plaintiff and the Defendant to and in the *East Mark* estate, and forthwith to sign the authority before set forth to enable the auctioneers to make such sale, or that it might be referred to the Master to settle a proper authority for that purpose, and that the Defendant might be directed to sign the same when so settled; and that he might be directed to do all other necessary acts for perfecting such sale on his part, and that the monies to arise from such sale might be applied according to the directions of the award.

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The Defendant, by his answer, insisted that he was not bound to execute an authority for the sale of the estate, it being uncertain whether the vendors could convey a good title; and the arbitrator having declared that in case of their inability so to do, it did not appear to him that he could make a specific award concerning the estate, and in the event of the rescinding that contract for want of a good title or otherwise, having given directions for the settlement of the business between the Plaintiff and the Defendant.

The answer further represented, that in *Trinity* term 1811, the Plaintiff, by means of a partial and unfair statement of the award, procured a writ of attachment against the Defendant for an alleged contempt of Court in not giving an authority for the sale of the estate; when the Defendant, having in his answer to the interrogatories exhibited to him, stated that it did not appear that the vendors could make a good title, he was reported not in contempt, and the writ of attachment was quashed: and the answer insisted on those proceedings as confirming the Defendant's construction of the award.

The answer also stated, that the Defendant had advanced large sums of money in the management and concerns of the estate, and that a compulsory sale with a defective title, as required by the Plaintiff, would be attended with great detriment to him.

The decree made by the Master of the Rolls on the 22d of *March* 1814 declared, that the Defendant was bound to perform his part of the award, by joining with the Plaintiff in the sale of all the estate, right, title, and interest of the Plaintiff and Defendant to and in the *East Mark* estate; and ordered, that the Defendant should join the Plaintiff in signing an authority to Messrs. *Hoggart* and *Phillips*, to sell all such estate, right, title, and interest, pursuant to the award accordingly; and in case the parties differed

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about the form of such authority, that it should be referred to the Master to settle the same; and that the Plaintiff and Defendant should duly sign such authority when so settled: and after such sale should have been made, that the Plaintiff and the Defendant should respectively execute all proper and necessary conveyances of their respective rights and interests in and to the *East Mark* estate to the purchaser or purchasers at such sale, and do all acts necessary to carry such sale into effect; and that the monies for which the said estate, right, title, and interest should be sold, after payment of all incidental expenses, should be paid and applied in such manner as is in the award directed.

On the 23d of *May* 1815 an order was made by consent, for a reference to the Master to settle and approve a particular and conditions for the sale of all the estate, right, title, and interest of the Plaintiff and Defendant to and in the *East Mark* estate. On the 15th of *September* 1815 the sale took place, and Mr. *Farquhar* became the purchaser at the price of 10,100*l.*; and by an order of the 22d of *January* 1816, it was referred to the Master to approve a proper conveyance. Before the sale the Defendant presented a petition of appeal from the decree at the Rolls; and having been attached for refusing to execute the deed of conveyance approved by the Master, he was on the 11th of *July* 1817 discharged, on executing the deed as an escrow, to be deposited in the Master's office, and abide the event of the appeal.

The appeal having been argued on a former day by Sir *Samuel Romilly*, Mr. *Leach*, and Mr. *Cooke*, for the Plaintiff; and by Mr. *Hart*, and Mr. *Spranger*, for the Defendant, the Lord Chancellor now gave judgment.

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The LORD CHANCELLOR.

This case presents four questions.

1st. What is the meaning of the award? It is contended on the part of Sir *Mark Wood*, that the Court of Exchequer having refused his application made in obedience to the award, for an order for the sale of the estate, inasmuch as that attempt to dispose of the *estate* became ineffectual, the *interest* of himself and *Griffith* under the contract, must be put up to sale. On the other hand it is urged, that till, by the report confirmed, it appears that a good title can be made, it was not the meaning of the award that the equitable interest, which might be more, or less, or nothing, should be sold.

2d. (A question to which I have given much consideration,) supposing the meaning of the award ascertained, and considering an award being founded in an agreement to refer, as an agreement of the parties, of which the specific performance may be enforced, whether the award may not be in its nature so unreasonable, that a court of equity will lend no assistance to its execution? A doubt founded in this instance on the circumstance that, according to the Plaintiff's construction, the arbitrator orders a sale before it is known that a good title can be made, and when the period during which the reference of inquiry into the title has been pending, must depreciate the property.

3d. Whether the award can be carried into effect? It is insisted by Mr. *Griffith*, that, supposing the meaning of the award such as the Plaintiff contends, it requires the parties to do acts which would amount to champerty or maintenance.

4th. Whether the question on the construction of the award has been already determined; the Court of King's Bench

Bench having dismissed the application of Sir *Mark Wood*, for an attachment against *Griffith*, on the report of its officer that *Griffith* had not been guilty of a breach of the award?

On the decision of these questions depends the general question, Whether, under the circumstances, the decree of the Master of the Rolls ought to be affirmed or reversed?

The decree declares, that the Defendant is bound to perform his part of the award, by joining with the Plaintiff in the sale of all their estate, right, title, and interest, to and in the *East Mark* estate. On that principle the decree proceeds; and the subsequent ordering part is calculated only to carry it into effect. The circumstances of the case are these: In 1797 the vendors entered into a contract with *Griffith* and *Wood*, for the sale of the estate, at the price of 23,000*l.*; in the same year possession was taken; and the history of this case may, I think, amount to a demonstration that the Court acts with something like justice, when, as in later times, it insists that purchasers taking possession of the estate shall not retain the price. The purchase-money was not put into a neutral state between the parties, as perhaps in all cases of possession by the purchaser it ought to be; but Sir *Mark Wood* payed on account of the joint contract, in 1797 5000*l.*, and in 1799 2000*l.*, and in 1800 he executed a lease, by which he incurred an obligation to maintain the lessee in the enjoyment of the estate, for no less a term than twenty-one years. In 1806 the vendors filed a bill in the Exchequer to compel performance of the contract; and the Defendants in that suit putting in question not the contract, but the title, the Court of Exchequer had only to refer it to the Remembrancer to inquire whether a good title could be made. It must be admitted that the case is not without difficulty, for the reference was directed in 1807, and the Remembrancer has not yet resolved that single question. It ap-

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pears that previously to 1809, *Griffith* and *Wood* had unfortunately engaged with each other in various suits at law and in equity, all which were referred to the decision of the arbitrator, and decided by his award. The question on the appeal is, whether the Master of the Rolls has rightly construed that award?

In construing an award it is the duty of the Court to favour that construction which renders the award certain and final.

It is extremely clear that every award must be certain and final; but it has, particularly in more modern times, been considered the duty of the Court, in construing an award, to find that it is certain and final; and instead of leaning to a construction, which in effect would destroy nine-tenths of the awards made, if possible to put one consistent sense on all the terms. In considering the meaning of this award relative to the sale of the estate, it must be recollected that the business of the arbitrator was to settle the differences between *Griffith* and *Wood;* and that the Court of Exchequer, or the vendors, Plaintiffs in that Court, might not consent to the sale of the interest, such as it was, or that property so circumstanced might not meet with a buyer; and that notwithstanding the direction to sell, the estate might thus remain unsold

The direction for the sale of the right, title, &c. is, according to its incontrovertible meaning, a direction that all the right, title, and interest in the estate (those words never having been before used in the award) should be forthwith sold. The arbitrator seems to have intended a sale not only of the right, title, and interest, but of the estate itself, if it could be brought to sale. The direction is express that *Wood* and *Griffith* shall consent to a sale, and shall, if either of them becomes the purchaser, accept such title as the Plaintiffs in the Exchequer can make. Attending to the constant language and practice of this Court, where it is repeatedly held that a party has by his acts rendered it impossible for him to object to a title, and coupling that with this express direction, it cannot be doubted that if the Plaintiff

Plaintiff or Defendant bought the estate, they must take such title as could be made. The arbitrator though he could compel them to consent to the sale, yet could make no such effectual order on the vendors, who were not parties to the reference. He foresaw that they might choose to retain the estate, notwithstanding the objections to the title, rather than carry it to sale subject to the depreciation arising from those objections. Providing for the event of their withholding their consent, he says, that in case the Court of Exchequer should not think fit to direct a sale, *Griffith* and *Wood* shall give authority to sell, not the estate, but all the right, title, and interest. Here is no qualification, no direction that the sale shall depend on the Remembrancer's report that the title is good.

Then comes the clause on which so much difficulty has arisen—"But if in either of the cases aforesaid it shall appear, that the said *M. H. Beach*, &c. cannot make a good title &c. it does not appear to me that I can make any specific award concerning the said *East Mark* estate." (*a*) It occurred to the arbitrator, that it might finally appear that a title could not be made to this estate, that the purchasers would not be obliged to take it, and that therefore in certain events which might happen he could not make a specific award respecting the estate itself. Does that render the award less final and certain with respect to *Griffith* and *Wood?* Being, as I say they were, the owners of the estate in equity, they had a right, subject to considerations of law to which I shall presently advert, to sell such right, title, and interest as they had. It is impossible on a fair exposition to contend, that the arbitrator meant by this clause to defeat all the prior clauses. In the construction of an award the Court is bound, so far as the terms will admit, to give to it such a meaning as shall render it conclusive; and not by the construction of

(*a*) See the clause, *ante* p. 46.

one part to defeat another. That is my opinion on the first point.

It is said that this opinion clashes with the judgment of the Court of King's Bench; I think not; but were it otherwise, if upon investigation I become convinced that their judgment is wrong, I should violate my duty by adopting it in preference to that which I think right.

Principle on which the Court decrees the specific performance of awards.

One difficulty which I confess I felt, I shall now state, together with the grounds on which I have at length overcome it. That a bill will lie for the specific performance of an award is clear, because the award supposes an agreement between the parties, and contains no more than the terms of that agreement ascertained by a third person; and then the bill calls only for a specific performance of an agreement in another shape: but the Court has always exercised the discretion of withholding its assistance for the performance of unreasonable agreements. I was much struck with the consideration of this as an agreement to sell an estate under the circumstances in which the arbitrator has directed a sale; the very fact that the title is in dispute in the Court of Exchequer, must throw a damp on the proceedings and depreciate the property.

No one will dispute this proposition, that if a man offers to sell an estate in fee simple, and it appears that he is unable to make a title to the fee simple, he cannot refuse to make a title to all that he has. The purchaser may insist on having his estate such as it is. The vendor cannot say that he will give nothing, because he is unable to give all that he has contracted to give. If a person possessed of a term for 100 years, contracts to sell the fee, he cannot compel the purchaser to take, but the purchaser can compel him to convey, the term, and this Court will

If a person possessed of a term, contracts to sell the fee, he cannot compel the purchaser to take, but the purchaser can compel him to convey, the term, and this Court will arrange the equities etween the parties.

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arrange the equities between the parties. But the present agreement is to be regarded as an agreement embodied in an award; and the question is, what is the effect of an agreement coming into a court of equity in that shape: and that question must be considered with reference to the cases in which Courts have determined, that they will conform to the opinion of judges chosen by the parties. If judges so chosen erroneously decide a question of law, the Court will abide by that decision. (*a*) Upon that principle I am of opinion that the objection of the unreasonableness of this award cannot be sustained.

The Courts will abide by the decision, though erroneous, of judges chosen by the parties to decide a question of law.

It is then contended that the performance of the award will involve the parties in the guilt of champerty and maintenance. It must be admitted, that neither this Court nor any other will enforce an agreement by which, if carried into execution, the parties would be compelled under the process of a court of justice, to do that which in the view of justice is criminal. In many of the proceedings relative to this award; on motions for rules for an attachment, and to discharge rules &c. this objection might have been urged; but without adverting to that circumstance, let us now consider the foundation of the objection according to the settled practice of the Court. I have referred to a class of cases in which this Court has been in the habit of declaring, that a party who contracts for the purchase of an estate in fee simple, is entitled to what the vendor can give. It is extremely clear that an equitable interest under a contract of purchase, may be the subject of sale. A

(*a*) On the question in what cases a mistake in law vitiates an award, see *Campbell* v. *Twemlow*, 1 *Price*, 81. *Steff* v. *Andrews*, 2 *Madd*, 6. *Wohlenberg* v. *Lageman*, 6 *Taunt.* 255. *Chace* v. *Westmore*, 13 *East*, 357. *Young* v. *Walter*, 9 *Ves.* 364. *Kent* v. *Elstob.* 3 *East*, 13. *Ainsley* v. *Goff*, *Caldwell* on Arbitration, p. 53. *Ching* v. *Ching*, 6 *Ves.* 282. and the authorities there cited. On the effect of unreasonableness, see *Lee* v. *Metcalfe*, 1 *Atk.* 64. and the cases collected in *Caldwell* on Arbitration, p. 108, 109.

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person claiming under that contract, becomes in equity a trustee for the persons with whom he afterwards contracts; without entering into any covenants for that purpose, they are obliged to indemnify him from the consequence of all acts which he must execute for their benefit; and a court of equity not only allows, but actually compels, him to permit them to use his name, in all proceedings for obtaining the benefit of their contract. Assuming that the award directs the sale of the estate, right, title, &c. before the determination of the suit in the Exchequer, what is that but what happens every day? If *Griffith* and *Wood*, during the pendency of the suit in the Exchequer, sold the estate to *A. B.*, he would have a right in a court of equity, to insist, as purchaser of the estate, that they should convey to him the fee simple, or such title as they had. So insisting, he claims no more than they would be entitled to claim, if they had not sold their equitable interest; having sold, they become trustees of that equitable interest: their vendee acquires the same right which they had; that is, a right to call on the original vendors, indemnifying them against all costs and charges, for the use of their names to enable them to execute the subcontract, by which they have undertaken to transfer their benefits under the primary contract. If I were to suffer this doctrine to be shaken by any reference to the law of champerty or maintenance, I should violate the established habits of this Court, which has always given to parties entering into a subcontract, the benefit which the vendors derived from the primary contract.

An equitable interest under a contract of purchase may be the subject of sale; the subcontract converts the original vendee into a trustee of his equitable interest for his vendee, who acquires the same rights which he had to the benefits to be derived under the primary contract. Such subcontracts are not within the doctrine of champerty and maintenance.

I think that the opinion of the Court of King's Bench was not against the contract; but if it were, it would be my duty as a Judge, with all respect to their authority, to express my own judgment. The opinion of that Court on an attachment, is in truth little more than the opinion of their officer. It is a consolation to me, that if I am wrong

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in this case, my error may be corrected elsewhere; but I have taken great pains to be right.

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The decree must be affirmed.

March 14.

On this day Mr. *Cooke* moved, on the part of the Plaintiff, that the conveyance executed by the Defendant, might be delivered out of the Master's office, to be executed by the Plaintiff, and delivered to *Farquhar*, the purchaser.

The Lord Chancellor.

The suit originated in a bill filed by Sir *Mark Wood*, praying the specific performance of the award. The late Master of the Rolls thought, that by their agreement so ascertained, the parties bound themselves to bring to sale their interest in the estate, the title to which had not yet been shown to be good, and during the pendency of a suit in the Exchequer between them and the vendors, and of a reference in that suit to the officer of the Court to examine the title. He held that the parties had agreed, if the estate itself could not be sold, to a sale of their right, title, and interest; a species of property which must be carried to market surrounded by difficulties and embarrassments. The purchaser of their interest in the contract might certainly, if a good title could not be made, compel repayment from the original vendors of the sums advanced by *Wood*; and he would probably be considered as having a lien on the estate to that amount; but it might be found that those vendors had no interest in the estate, and in that case the purchaser would have only a personal demand against the individuals who received the money.

I repeat that I proceeded to the confirmation of this judgment most unwillingly; because it occurred to me that it was next to impossible that such an interest could be sold

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sold otherwise than to the loss and disadvantage of one, at least, of the persons who had entered into the contract. I took pains to persuade myself that the award had not the meaning imputed to it by the Master of the Rolls; but being finally of opinion that such was its meaning, I could not refuse to decree the specific performance of the award, considered as an agreement between the parties. The objections of the Defendant appeared to me untenable. I thought it impossible to maintain, that the Court, in enforcing the performance of an agreement embodied in an award, applies exactly the same principles as in the case of a common agreement between *A.* and *B.* Having submitted to a judge chosen by themselves, the parties give to his acts an authority which the Court would not allow to their own. If the objection that the acts which the award directs amount to champerty or maintenance can be sustained, I am satisfied that this Court has almost daily decreed a violation of the law.

In enforcing the performance of an agreement embodied in an award, the Court proceeds on peculiar principles.

The order must be made, but I shall give no costs.

Feb. 5.

HOULDITCH *v.* HOULDITCH.

After an order for the taxation of a solicitor's bill, staying proceedings at law till the report, the solicitor having died before a report, and no measures having been taken for continuing the taxation, his administratrix proceeding at law against the client, was held not to have committed a contempt.

ON the 13th of *June* 1816, an order was made, on the petition of the Defendant, for a reference to the Master to tax the bill of his solicitor, the Defendant submitting to pay what should appear due on such taxation; and the order directed that all proceedings at law against the petitioner on account of the bill should be stayed until after the Master had made his report. On the 7th of *April* 1817, before a report had been made, the solicitor died intestate; and on the 15th of *January* last, his administratrix caused

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the defendant to be arrested and held to bail for the amount of the bill of costs. On this day the Defendant moved that the administratrix and her solicitor might be committed for a contempt.

Sir *Samuel Romilly* and Mr. *Wakefield*, for the motion.

The taxation may proceed without a fresh order, notwithstanding the death of the solicitor; the Defendants undertaking to pay the amount when ascertained, is binding on him in favour of the representatives.

Mr. *Wingfield*, against the motion.

The death of the solicitor terminated the proceedings under the order; nor is any explanation given of the Defendant's delay, in suffering the interval between the death in *April* 1817, and the commencement of the action at law in *January*, to elapse without any attempt to revive the order.

The LORD CHANCELLOR.

It is impossible to visit this proceeding as a contempt.

Motion refused, with costs; the administratrix consenting to an order for the Master to proceed on the taxation, and the Defendant undertaking to pay to her what on such taxation shall appear due, with a stay of all proceedings at law.—Reg. Lib. A. 1817, fo. 552.

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Feb. 9.

Ex parte GREENHOUSE.

On a reference in a petition under Stat. 52 Geo. 3. c. 101. the Master may receive affidavits in evidence.

IN *November* 1815, on a petition presented under the act providing a summary remedy in cases of abuses of trusts created for charitable purposes (*a*), an order was made directing certain inquiries before the Master. (*b*) In proceeding on the reference the Master received affidavits in evidence; and having made his report, a petition was presented by the original petitioners to confirm it and carry it into execution. A counter petition was then presented, insisting that the proceeding of the Master, in receiving affidavits in evidence, was contrary to the established usage of the Master's office, and to the practice of the Court, and that he ought to have made his report upon the evidence of witnesses examined before him, or before commissioners upon interrogatories; and therefore praying that the Master might be directed to review his report, and to take the evidence relative to the matters referred to him by interrogatories.

Mr. *Hart* and Mr. *Phillimore*, in support of the second petition.

The Master has erred in persisting, against the protest of the petitioners, to receive affidavits. No clause in the statute on which these proceedings are founded, authorizes such a departure from the established usage, or excludes the parties from that right of cross-examination which could not have been denied to them under an information. The statute declares, that it shall be lawful for the distinguished persons whom it enumerates, to hear petitions "in a summary way, and upon affidavits or such other evidence as shall be produced upon such hearing, to determine the

(*a*) Stat. 52. Geo. 3. c. 101. (*b*) 1 *Madd.* 92.

same;"

same;" but it contains no regulation relative to the proceedings in the Master's office, and introduces no innovation in the practice there. That practice is founded on the incontrovertible principle, that the purposes of justice are better attained by examination on interrogatories, with the opportunity of cross-examination, than by affidavits, in which the deponent, instead of being sworn to divulge the whole truth, swears only to the truth of what he states; a statement in which the person who prepares it, is careful to to insert nothing unfavourable to his case. The inexpediency of a deviation from that practice is strongly evinced in the present instance, by the loose and general expressions in the affidavits on which the Master has founded his report. On former occasions the Court has held itself bound to a strict construction of the act (a); and in the spirit of those decisions, will refuse to interpret it as authorizing, in the absence of an express direction, by implication and inference, so dangerous an innovation in the rules of evidence.

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Heald*.

The Masters have generally understood, that on references in causes, they may proceed on affidavits or interrogatories at their discretion; but in this case the Master has no choice; it is not competent to him to examine on interrogatories. The legislature has created a new tribunal, to which a jurisdiction is committed in certain specified cases; neither the court so constituted, nor the Master acting as its organ, has any authority to proceed otherwise than as directed by the act. The express direction is to proceed in a summary way, and by affidavit. It is vain to insist on the convenience of cross-examination; the Court has no power to exhibit interrogatories. It has been argued on the other side that no evidence can be good against a person who has not an opportunity of cross-examination;

(a) Ex parte *Rees*, 3 *Ves. & Beames*. 10. Ex parte *Brown*. *Coop*. 295.

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examination; but that argument is confronted by whole classes of cases. In bankruptcy, in lunacy, on interlocutory applications in courts of law as well as equity, on motions to set aside judgments, and for delivery of annuity deeds; in all these instances evidence is taken on affidavit. The examination of the party on interrogatories, proceeds on very different principles, from the examination of a witness; and is only a mode of compelling that discovery to which his opponent is entitled. Under this statute neither the Court nor the Master has any authority to enforce the attendance of witnesses.

Mr. *Hart*, in reply.

There is no ground for contending that the legislature meant to abolish the ordinary course of proeeeding. The order under which we are now arguing, directs that the parties shall be examined on interrogatories; on what principle can the Court, retaining that power, hold itself excluded from the regular examination of witnesses?

The MASTER *of the* ROLLS.

I shall not finally dispose of the general question, but at present I am strongly of opinion that the proceeding of the Master is right. The question is not whether the Master has drawn a correct conclusion from the evidence, but whether he ought to have received affidavits, or to have directed examination on interrogatories? Whether the proper mode of proceeding under the statute, is by analogy to the proceedings in causes? The statute creates a new tribunal, to decide in a summary way, on petition, by a mode of proceeding quite new in all its parts. A petition presented by any two or more persons, on the subject of certain trusts, is to be heard and determined on affidavit, or such other evidence as shall be produced. Unquestionably had the same points arisen before the Court, no objection could have been made if they had been decided on affidavits.

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The question is, whether the Master is to observe a mode of proceeding different from the Court? The act does not in terms direct a reference to the Master; but why, when the case comes before him, is he to be guided by the analogy of a cause, to which, in every other stage, the proceedings are not analogous? The objection that difficult questions are unfit to be decided by affidavit, is an objection to the act. The Court clearly may proceed by affidavit. Can the Master originate a mode of proceeding different from that prescribed by the act? Is he, instead of applying to the Court for direction, himself to institute a new course? The Master may properly ask what power he has to issue a commission. This is a summary jurisdiction, and must be exercised strictly in the mode appointed. Had it been intended that, in the ulterior proceedings, a course should be pursued different from that originally prescribed to the Court, would not the legislature have specified that course? With respect to analogy, in causes, you have the analogy of proceeding in the manner contended for by the petitioners; on petitions in bankruptcy, lunacy, &c. you have the analogy of proceeding by affidavit. Why on a petition, is the Master to adopt the analogy of proceedings in a cause? a course which the legislature lays aside, and for which it substitutes petition; a summary proceeding by petition and affidavit. In cases of petition it is the established practice to decide difficult questions on affidavit. The court might direct a different mode of proceeding; but the question is, whether the Master can himself institute a new course? I cannot say that the Master did wrong in proceeding on affidavit.

Feb. 16.

On this day his Honour said, that he retained the opinion which he had before expressed, and dismissed the counter-petition.

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Rolls.
Jan. 27.
Feb. 5.

CARTER *v.* DEAN.

A cowkeeper, all his transactions of buying and selling being incidental to the occupation of farmer, grazier or drover, is exempted from the operation of the bankrupt laws, by Stat. 5. Geo. 2, c. 30, § 40.

THE bill in this case, filed by one of the executors of *Edward Pillbeam*, deceased, against his co-executors, and the persons interested in the real estates of the testator, stated, that in consequence of devastavits committed by his co-executors, judgments at law had been obtained by the creditors of the testator against the plaintiff personally; and charging that the testator was, at the time of his decease, a trader within the meaning of some of the laws in force against bankrupts (*a*), prayed an account of the personal estate, and a declaration that the freehold estate was subject to make good the deficiency of the personal estate, and if necessary, a sale for that purpose.

The testator, at the time of his death, carried on the business of a cowkeeper. It appeared in evidence, that the business consisted in buying and selling cows and calves, and selling milk; that the testator bought cows for the purpose of making a profit by selling the milk, and when they became dry and yielded no milk, fattened and sold them; that he kept a stock of 20 or 30 cows, and bought grains, hay, and distillers' wash, as food for them; that he occupied about 38 acres of meadow land, the better to enable him to carry on the business of a cowkeeper, grazing his cows thereon, and making hay for them; that he did not carry on the business of a farmer, by ploughing land, and sowing, reaping, and selling corn; that the place at which his business was conducted, was separate from any other of his concerns, and exclusively appropriated to the business of a cowkeeper; and that he exercised no other trade.

(*a*) By Stat. 47 Geo. 3. c. 74. the real estates of traders are assets for the payment of all their debts.

Mr.

Mr. *Hart* and Mr. *Abercromby*, for the Plaintiff.

Mr. *Agar* and Mr. *Parker*, for the Defendants, in addition to the printed authorities, cited *Ex parte Ledyard*, from a note of Mr. *Montague*. (*a*.)

The MASTER *of the* ROLLS.

In order to entitle the Plaintiff to an account of the real estate, it must appear that the testator was a trader within the meaning of the bankrupt laws. The facts are, that the testator was a cowkeeper, occupying 38 acres of pasture land; that he purchased large quantities of cows, and keeping them while a profit could be made by selling the milk, when they became unfit for that purpose, fatted and sold them. I am clearly of opinion, that such transactions amount not to a trading within the meaning of the bankrupt laws. The cases of *Mills* v. *Hughes* (*b*), and *Bolton* v. *Sowerby* (*c*), exclusive of *Ex parte Ledyard*, decide the question. Farmers, graziers, and drovers, are expressly exempted from the operation of the bankrupt laws (*d*); and the term drover denotes, not a driver, but a dealer in droves, of cattle. All the transactions of buying and selling in which the testator was engaged, are referable to some one of these three characters; as the occupier of pasture land, he was a farmer and grazier; as a dealer in cattle, a drover; and "a person cannot be less exempt from the the operation of the bankrupt laws, because he is exempted partly as a farmer, partly as a grazier, and partly as a drover, for the several acts done by him in those respective characters." (*e*)

(*a*) "Cow-keeping, by grazing the cows and selling the milk, seems not to be a trade. 17th *August*, 1800."

(*b*) *Willes*, 588. (*c*) 11 *East*, 274.

(*d*) 5 *Geo.* 2, *c.* 30. § 40. made perpetual by 37 *Geo.* 3, *c.* 124.

(*e*) Per Lord *Ellenborough*, 11 *East*, 277.

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The bill therefore, so far as it seeks an account of the real estate, must be dismissed with costs.

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Feb. 10. 15. 16.

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The will (attested by three witnesses) of a person having a power to dispose of a fund consisting partly of real estates, and partly of household furniture, linen, and plate, containing a gift of "all my estates and effects of whatsoever denomination," and of "my household furniture, with linen and plate," is not an execution of the power. Parol evidence is not admissible to show the inadequacy of the personal estate of the testatrix to satisfy the purposes of the will; but with regard to real estate, parol evidence would be admissible for that purpose, if an intention to pass realty appeared on the will.

WILLIAM BROWNE, by his will, dated 17th *January* 1810, gave, devised, and bequeathed unto *Thomas Curry* and *Edward Drury*, and the survivor of them, and the heirs, executors, and administrators of such survivor for ever, a moiety of certain freehold hereditaments, and also all his household furniture, beds, bedding, plate, linen, and china, and all his stock in trade, money, and securities for money, debts, and all the residue of his real and personal estate and effects, upon trust to permit *Isabella Common*, the wife of *Robert Common*, to have the free use and enjoyment of his household furniture, beds, bedding, plate, linen, and china, during her life; and after her decease, upon trust to divide and distribute the same household furniture, beds, bedding, plate, linen, china, or the monies arising from the sale thereof, in case the same should be sold, unto and equally among the issue, child, or children of *Isabella Common*, and to the issue, child, or children of such of them as should be then dead, and in default of any such issue, child, or children, or in case of any such issue, child, or children, who should die before attaining the age of 21 years, without leaving lawful issue who should attain that age, and be living at the death of *Isabella Common*, then the testator directed that his said household furniture, beds, bedding, plate, linen, and china, should go unto such person or persons to whom *Isabella Common* should, by her last will and testament, notwithstanding her coverture, give and bequeath the same; and the testator farther directed his trustees to sell and dispose of his stock in trade, and get in all his outstanding estate and

and effects, and place out the monies arising therefrom upon government or real securities, and to pay all the rents, interest, dividends, and proceeds of his said freehold premises, and of the residue of all his personal estate and effects whatsoever, unto *Isabella Common* for her life, and after her decease, to convey, assign, transfer, &c. all his said freehold premises, and all the residue of his personal estate, unto and equally among all and every her issue, child, or children, and to the issue, child, or children of such of them as should be then dead, at their respective age or ages of 21 years; and in default of any such issue, child, or children, or in case of any such issue, child, or children, who should all die before attaining the age of 21 years, without leaving lawful issue who should attain that age, and be living at the decease of *Isabella Common*, then he directed that his said freehold premises, and all the said residue of his real and personal estate and effects whatsoever, should go unto such person or persons to whom she should, by her last will and testament, notwithstanding her coverture, give, devise, and bequeath the same.

William Browne died on the 27th of *April*, 1811, in the life of *Isabella Common*, who having survived her husband, died on the 5th of *March* 1815, without issue. Her will, dated the 25th of *September* 1812, executed and attested so as to pass real estates, was in the following words: "I give and bequeath unto my father and mother, *Thomas* and *Ann*, all my estate and effects of whatsoever denomination, except the sum of 10*l. per annum* unto my sister *Mary* until she marries, with half of my trinkets and clothes, the other half unto my sister *Ann Pearson*, with the sum of 100*l.*, to be paid six months after my decease, and the same sum unto my sister *Mary* after her marriage; but in case she should not marry, the 10*l. per annum* to be regularly paid every half year: at the decease of my father and mother, the property to be equally divided between my brothers and sisters, share and share alike: and in case *Ann Pearson*

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dies before she receives her legacy, the sum to be the property of *Thomas*, son of *Thomas* and *Ann Pearson*; likewise my household furniture, with linen and plate, to be equally divided between *Ann* and *Mary*, my sisters; an inventory to be taken as soon as my decease, and not to be divided until the decease of my father and mother. I give and bequeath the sum of 50*l.* unto *John Common*, son of *Robert Common* deceased, to be paid when he shall arrive at the age of 21 years; but if he dies before that time, it must sink into the residue of my estate and effects." The will concluded with a bequest of a gold ring to be purchased.

The bill, filed by the father and mother, and brothers and sisters of *Isabella Common*, stated, that exclusively of a mortgage debt of 100*l.*, and of a sum of 100*l.* due from the Plaintiff *Thomas Jones*, which she considered as lost, *Isabella Common* was not, at the time of making her will, or at her death, possessed of or entitled to any household furniture, plate, linen, or china, or any real or personal estate whatsoever, which had not belonged to the testator, *William Browne*, or come to her possession under or by virtue of his will: and insisting that *Isabella Common* had an absolute interest in the case of her dying without issue, in the real and personal estates of *William Browne*, or at least that his real and personal estates, subjected to her disposal and appointment, were well appointed and disposed by her will, prayed a declaration to that effect, and a conveyance and account.

By the parol evidence offered on the part of the Plaintiffs it appeared, that the household furniture, plate, and linen of the testator *Browne*, instead of being sold on his death, were removed to the residence of *Isabella Common*, and possessed by her during her life; that her husband died insolvent, and that she had no property beyond what she derived under the will of *Browne*, except the

 sums

sums mentioned in the bill, and three sets of window curtains.

Mr. *Trower* and Mr. *Mathews*, for the Plaintiffs, having declined to argue the point made by the bill, that *Isabella Common* took an absolute interest under the will of *Browne*, and admitting that she took only an interest for life with a power of disposition, contended that her will was a valid execution of the power. It has long been settled that an express reference to the power is not necessary. *Probert* v. *Morgan* (a), *Andrews* v. *Emmot* (b), *Bennet* v. *Aburrow.* (c) Any instrument, (having the prescribed formalities,) by which the party intended to execute the power, of whatever nature, or in whatever terms expressed, will amount to a valid execution. The only question is, whether it contains evidence of that intention. In the case of *Bennett* v. *Aburrow* (d), the late Master of the Rolls says, "This is always a question of intention, whether the party meant to execute the power or not. Formerly it was sometimes required, that there should be an express reference to the power. But that is not necessary now. The intention may be collected from other circumstances; as that the will includes something the party had not otherwise than under the power of appointment; that a part of the will would be wholly inoperative, unless applied to the power." That is the doctrine which must decide this case. The testatrix had no personal property sufficient to satisfy the purposes of her will; having no more than the sum of 100*l*., she bequeaths two sums of that amount, and an annuity of 10*l*.; having no household furniture, plate, or linen, she makes a general bequest of all her property of those descriptions; her will therefore, unless considered as an execution of the power,

(a) 1 *Atk.* 440. But see the case stated from the Register's Book, *Sugden* on Powers, p. 282.

(b) 2 *Bro. C. C.* 297.

(c) 8 *Ves.* 616.

(d) 8 *Ves.* 616.

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remains inoperative. The attestation of her will by three witnesses, is a demonstration that she designed it as an execution of the power. No motive can be assigned for that form of attestation, but an intention to pass real estate; and she could pass none except by virtue of her power. That circumstance brings this case within the authority of *Standen* v. *Standen* (*a*), sanctioned by *Bradly* v. *Westcot*. (*b*) That the words of the will, " all my estate and effects," are sufficient to pass the absolute interest in real property, is too clear for argument. *Barnes* v. *Patch* (*c*), *Doe* v. *Langlands*. (*d*)

Mr. *Hart* and Mr. *Parker*, for the Defendants.

Admitting that a direct reference to the power is no longer required, at least the intention to execute the power must appear by necessary implication on the face of the instrument, which must be incapable of rational explanation, except as an exercise of the power. The question in this case is not whether the testatrix intended to execute the power, but whether, on the face of the will, she has given sufficient evidence of that intention? The Court cannot receive as evidence the circumstances of her personal estate. A will of personalty is ambulatory during the life of the testator, and speaks not from the date, but from the death. The inadequacy of a testator's personal property at the date of the will, to satisfy the bequests which it contains, affords no proof of an intention to dispose of a fund over which he possesses a power, because he may calculate on an accession of fortune; nor can a like inadequacy at the death, when the will operates, be evidence of his intention at the antecedent period of its date. To that fact therefore the Court cannot advert. *Nannock*

(*a*) 2 *Ves.* jun. 589. affirmed on appeal, *Standen* v. *Macnab*, 6 *Bro. P. C.* by *Toml.* 193.

(*b*) 13 *Ves.* 453. (*c*) 8 *Ves.* 604. (*d*) 14 *East*, 370.

v. *Horton*,

v. *Horton* (*a*), *Jones* v. *Tucker*. (*b*) The will contains nothing which evinces a design to exercise the power. The words may be sufficient to pass realty, but do not necessarily denote that intention; nor can it be collected from the form of attestation. *Doe* v. *Rout*. (*c*) The will not only contains no reference to the power, but is in terms expressly confined to the property of the testatrix.

The MASTER *of the* ROLLS. *Feb.* 16.

The first point originally made by the Plaintiffs in this case, that *Isabella Common*, under the will of *Browne*, took an absolute estate in the event of her dying without issue, has been very properly abandoned. It is clear that she took only an interest for her life with a power of disposition. The Plaintiffs' case is therefore reduced to the second point, that her will is a valid execution of the power.

The first question is, whether the Court can collect, on the face of the will, so far as respects personalty, an intention in the testatrix to pass this property; I say on the face of the will, because it is now clear that the Court cannot look beyond the will. Whatever is the inadequacy of a testator's property to satisfy the terms of the will, and whatever may be the conviction of the Court of his intention to execute the power, the state of his personalty, at at the time of the will or of the death, cannot be examined for the purpose of collecting evidence of his intention. In *Jones* v. *Tucker*, as strong a case as can be stated, the testatrix had given the precise sum of 100*l.*, of which she was empowered to dispose, having, as was alleged, no other fund to satisfy that bequest; yet the Master of the Rolls, although he declared his private opinion that she designed to dispose of the fund, which was the subject of her power,

(*a*) 7 *Ves.* 391. (*b*) 2 *Mer.* 533. (*c*) 7 *Taunt.* 77. S. C. 2 *Marsh.* 397.

 refused

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refused an inquiry into the circumstances of her personal estate. In the present case, so far as respects personal property, it is clear that nothing on the face of the will denotes an intent to dispose of this fund. The will purports to pass the property of the testatrix, in terms appropriate for that purpose; without reference to the power, or to any thing which is the subject of it. On this instrument the judgment of the Court must be founded; nor can I, consistently with the principles to which I have adverted, receive the evidence that has been offered of the insufficiency of the testatrix's personal property to satisfy the purposes of her will.

The only remaining question (and but for that the case would hardly be open to argument) is, whether so far as the real estate is concerned, an intention to exercise her power can be collected from the will, and from the extrinsic evidence, to which on the subject of realty the Court is permitted to resort. On that point there is a shade of novelty in this case; but, notwithstanding an anxiety to support the will, I should not feel justified in pronouncing a judicial opinion that the testatrix designed to pass this real property. The case of *Standen* v. *Standen* has established that with regard to real estate, the Court may examine whether the circumstances of the testator's property are such as to give effect to the will; and if this will had contained an unequivocal devise of realty, the Court, under the authority of that decision, must, in order to give operation to an instrument, which would otherwise be inoperative, have resorted to the fund the subject of the power. But this will contains no words which will be without operation unless referred to the power. On the contrary, the testatrix uses terms of generality, "all my estate and effects of whatever denomination." That clause would embrace all her real and personal property, but would it go beyond that? Can it extend to what is not the property of the testatrix? The words are not a specific

description

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description of any estate, or of any species of interest; but adapted to comprehend every thing which was, and to exclude every thing which was not, a part of her property. In order to apply them to property not her's, we must reject the pronoun "my," and say, that by the phrase, my estate and effects, she meant to give what was not her own; that would be not to construe, but to contradict the words of the will. The distinction, notwithstanding some expressions of Lord *Rosslyn* in *Standen* v. *Standen*, being now established between property and power, these words, containing no direct reference to any particular fund, nothing in description to enable the Court to collect her intention to exercise her power, are not sufficient to designate with due certainty, property not her own, but of which she was empowered to dispose. Though she had no real estate, she might have personal property of various descriptions, and the terms would be satisfied by passing that.

I am bound therefore by the doctrine of the Court, to consider the will of *Isabella Common* as confined to her property, and not comprehending the fund over which she had a power.

Bill dismissed, without costs except as against the trustees.

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Jan. 15. 29. March 4.

DAVIS *v.* The Duke of MARLBOROUGH.

The estates which by stat. 5 *Ann.* c. 3. for perpetuating the memory of the great actions performed by the Duke of *M.*, are limited to the then Duke for life, remainder to *S.* his Duchess for life, remainder to the heirs male of the body of the Duke, remainder to all and every his daughters, in such manner as the titles are therein-before limited, in order that they may always "go along and be enjoyed with the titles and dignities," with a proviso restraining alienation to the prejudice of the persons in remainder, are not inalienable, and the rents and profits may be effectually aliened by the person in possession, as against himself. The pension granted by stat. 5 *Ann.* c. 4., "for the more honourable support of the dignities" of the Duke of *M.*, and his posterity, payable out of the revenues of the Post-Office, to such person severally and successively to whom the same should come by virtue of that act, with a proviso that the acquittance of every such person should be a sufficient discharge, is inalienable.

A motion for a receiver therefore, by an annuitant, to secure whose annuity the Duke had executed an indenture for conveying the estates and the pension to a trustee, was granted as to the estates, and refused as to the pension.

BY letters patent of the 5th of *May* 1705, Queen *Anne* having been enabled by stat. 3 and 4 *Anne*, c. 6.) granted the honour and manor of *Woodstock*, and the hundred of *Wootton*, to *John* Duke of *Marlborough*, his heirs and assigns for ever. By stat. 5 *Anne*, c. 3., (entitled "an act for the settling of the honours and dignities of *John* Duke of *Marlborough* upon his posterity, and annexing the honour and manor of *Woodstock*, and house of *Blenheim*, to go along with the said honours,") for perpetuating the memory of the great actions performed by the Duke, after enacting that the titles and dignities which had been granted to him and the heirs male of his body, should on failure of issue male, be vested in his daughters successively, in a course of devolution therein particularly described, it was enacted, to the intent that the honour, manor, and park of *Woodstock*, and the house then erecting there called *Blenheim*, and the Hundred of *Wootton*, should always go along and be enjoyed with the titles and dignities aforesaid, that the Duke should be seized of the said honour, manor, &c., for life; and that after his decease the same should remain to *Sarah* his Duchess for life; and after her decease to the heirs male of the body of the Duke; and for default of such issue to all and every the daughters of the Duke, in such manner as the titles were

therein-

therein-before limited. By the fourth section of the act, a power of leasing was given to the then Duke and Duchess; and the fifth section contained the following proviso: "That neither the said Duke of *Marlborough*, or the heirs male of his body, nor any of his daughters, or the heirs male of their bodies, or any other person to whom the premises shall come or descend by virtue of the limitations aforesaid, shall have any power by fine or recovery, or any other act, assurance, or conveyance in the law, to hinder, bar, or disinherit any the person or persons to or upon whom the said manors, house, lands, tenements, hereditaments, or premises, are hereby vested or limited, from holding or enjoying the same, according to the limitations before in this act mentioned, other than and except such leases as the said Duke and Duchess may make, by virtue of the powers herein-before mentioned, and such other leases as tenants in tail may and are enabled to make, by virtue of the statute made in the two-and-thirtieth year of the reign of King *Henry* the Eighth, and grants of lands or tenements held by copy of Court Roll, according to the customs of the respective manors aforesaid; but all such fines, recoveries, act, assurances, and conveyances, other than such leases and grants by copy as aforesaid, shall be, and are hereby declared and enacted to be void."

By stat. 5 *Anne*, c. 4. (entitled, "an act for settling upon *John* Duke of *Marlborough*, and his posterity, a pension of 5000*l.* *per annum*, for the more honourable support of their dignities, in like manner as his honours and dignities, and the honour and manor of *Woodstock*, and house of *Blenheim*, are already limited and settled,") reciting among other things the preceding statute, and the wish of the House of Commons to make some provision for the more honourable support of the Duke's dignities in his posterity, a pension of 5000*l.* (issuing out of the revenues of the Post Office) was granted to the Duke for life, and after his decease to *Sarah*, his Duchess, for life, and after her decease

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cease to such persons severally and successively to whom, and in such manner as, the title, honours, and dignities, are by the preceding act limited. After directing that the annuity should be paid by the post-masters, &c. to *John* Duke of *Marlborough*, and "to all others severally and successively to whom the same should, after the decease of the said Duke, come, descend, remain, or belong by virtue of this act;" and that the acquittances of the Duke, and of every such other person, should be a sufficient discharge, the act contains a proviso, "that neither the said Duke of *Marlborough*, or any person to whom the said annuity or yearly pension of 5000*l.* hereby enacted to be paid as aforesaid, shall come, descend, remain, or belong, by virtue of the limitations aforesaid, shall have power by any act, assurance, or conveyance in the law whatsoever, to hinder, bar, or disinherit any the person or persons, to whom the said annuity or yearly pension is, by virtue of this act, limited or appointed to come, descend, or remain, from holding, enjoying, receiving, or taking the same, according to the limitations thereof made by this act, but that every such act, assurance, or conveyance shall be, and is hereby declared and enacted to be, void."

The bill stated, that by indenture of the 21st of *March* 1811, *George* Duke of *Marlborough*, then Marquis of *Blandford*, in consideration of the sum of 999*l.*, granted to the Plaintiff an annuity of 155*l.* for the term of 99 years, if the Duke should so long live, and for securing payment of the annuity, conveyed to a trustee the manors and hereditaments comprised in the act of *Anne*, and the pension of 5000*l.* *per annum*, for a term of 500 years, to commence from the death of the then Duke of *Marlborough*, together with certain other estates for the residue of the respective terms to which the Duke was entitled therein, (subject to certain annuities) upon trust among other things, if the annuity should be in arrear 50 days, by the rents and profits of the estates, or by felling timber, or by sale of underwood or

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fixtures on the premises, to raise sums for payment of the arrears, with power of sale if the annuity should be in arrear for three months; and, by the same indenture, the Duke assigned the pension of 5000*l.* (from the decease of the then Duke) to the same trustee, upon trust to secure the Plaintiff's annuity; and nominated the trustee his attorney to demand and receive the pension; and the Duke and the trustee appointed *Robert Withy* their receiver of the rents and profits of the premises conveyed, with a proviso that *Withy* should not act unless the annuity should be in arrear for six months.

After farther stating the death of the late Duke of *Marlborough* on the 30th of *January* 1817, and that the annuity had been unpaid and in arrear since the 21st of *September* 1815, the bill charged that the Duke of *Marlborough* had confessed judgments to divers persons, alleged to be creditors of the Duke, for divers sums, whose names, and the particulars of whose demands, the Plaintiff was unable to set forth, but whom he believed not to be *bonâ fide* creditors of the Duke, and that they had sued out and executed writs of *elegit* against the hereditaments, estates, and premises comprized in the indenture of the 21st of *March* 1811, and were then in possession of the said estates, and that by reason of the prior incumbrances affecting the said estates, and particularly of a term of 500 years created by an indenture of the 18th of *March* 1811, to secure an annuity of 155*l.* granted by the Duke to one *Philips*, the Plaintiff was deprived of his legal remedies against the same.

The bill prayed an account of the arrears of the Plaintiff's annuity, and payment (according to its priority) of the amount, by sale or mortgage of the premises comprized in the indenture of 21st *March* 1811, a provision for the security of the future payments, and the appointment of a receiver of the rents and profits of the estates, and of the pension of 5000*l.*

On

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On this day Mr. *Hart* and Mr. *Seton*, for the Plaintiff, moved that it might be referred to the Master to approve a proper person to be the receiver of the rents and profits of *Blenheim House* and *Woodstock Park*, and of the pension of 5000*l. per annum.*

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Hampson*, against the motion.

An order for a receiver cannot be granted in the absence of judgment creditors who are in possession of the estates under writs of *elegit.* Before the Court will entertain the application, they must be made parties to the suit. But independently on this preliminary difficulty, an insuperable objection arises from the nature of the property.

The pension payable out of the revenues of the Post Office, granted (according to the express terms of the act) (*a*) as a provision for maintaining the dignity of the dukedom in perpetual memorial of the eminent services of which it was the reward, is inalienable. The law qualifies the rights of ownership by reference to the purpose for which they were conferred. The precise point in this case is laid down in an early authority in *Dyer* (*b*); and an argument *a fortiori* may be deduced from the decisions that the future pay of a military officer is not assignable at law (*c*) or in equity. (*d*) The design of the grant would be defeated by alienation. It might as reasonably be contended

(*a*) Stat. 5 *Ann.* c. 4.

(*b*) " If a man were created Duke, and, for the maintenance of his dignity, the King granted him 20*l.* as an annuity, he could not grant that to any other, for it is incidental to his dignity." *Dyer* 2. *a.*

(*c*) *Flarty* v. *Odlum*, 3 *T. R.* 681. *Lidderdale* v. *The Duke of Montrose*, 4 *T. R.* 248. *Barwick* v. *Reade*, 1 *H. Bl.* 627. and see *Ardbuckle* v. *Cowtan*, 3 *B & P.* 321. *Priddy* v. *Rose*, 3 *Mer.* 86.

(*d*) *Stone* v. *Lidderdale*, 2 *Anstr.* 533. and see *M'Carthy* v. *Goold*, 1 *Ball* and *Beatty*, 387.

that

that the judges may assign their salaries, given for the support of the dignity of their office.

The inalienability of the pension is farther evinced by the provision in the act (*a*), which renders the remedy for the recovery, and the acquittance for the receipt, personal to the Duke and his posterity. Can the order of this Court, or the receipt of the receiver, be a discharge to the postmasters in passing their accounts?

From the same principles which thus establish that the pension is inalienable, it follows, that the Duke possesses no power of alienation over the estates; estates expressly limited to go along and be enjoyed with the titles. (*b*)

The counsel for the Plaintiff not having expected opposition to the motion for a receiver on the ground taken, desired time to refer to the authorities.

The LORD CHANCELLOR.

A case involving so many important questions certainly requires full discussion.

A pension for past services may be aliened; but a pension for supporting the grantee in the performance of future duties, is inalienable. Can it be contended that the Lord Chancellor could alien his pension, payable out of the revenue of the Post Office, granted for sustaining the dignity of the office?

A pension for past services may be aliened; but a pension for supporting the grantee in the performance of future duties, is inalienable.

This case differs from that of a grant to the grantee and his assigns (*c*); the pension being granted to the individual, in what mode can the assignee recover out of funds which are not accessible by the common forms of law? If a

(*a*) 5 *Ann.* c. 4. § 2, 3. (*b*) 5 *Ann.* c. 3. § 3.
(*c*) See *M'Carthy* v. *Goold*, 1 *Ball* and *Beatty*, 389.

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subject gives land to *A.* for his life, he gives to *A.* and his assigns; but where property is granted by a warrant from the crown, does it follow that the warrant extends to a person who is in no way described in that instrument?

Considering the many important doctrines on the effect of grants by warrant, and by sign manual, regard being had to the funds out of which the grant is made, I must be cautious not to confound the law on a point of so much moment.

Jan. 29.

On this day the case was mentioned again by Mr. *Hart* and Mr. *Seton,* in support of the motion for a receiver.

If there were any principles of public policy by which the alienation of this property would be restrained, what was the necessity for the introduction of the restrictive clauses in the acts of parliament? The introduction of those clauses shows, that independently on the acts no such restriction existed, and that notwithstanding the acts no such restriction exists, except in the cases to which those clauses apply; and these are admitted to be such alienations only by which the limitations in remainder would be defeated.

The same conclusion is derived from the statute, by which recoveries suffered by tenants in tail of lands granted by the crown for services, were made void. (*a*) If in the case of a Peer there was any principle of public policy, by which such a recovery would have been avoided, what was the necessity for the act? Yet nobles are expressly included in it; and the preamble states the policy of those grants to be, the encouragement thereby given to posterity to emulate the services of their ancestors.

(*a*) Stat. 34 & 35 *Hen.* 8. c. 20.

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The cases of the pay of a military officer, or the salaries of the judges, are clearly distinguishable. The Courts of Law have held the half-pay of officers to be in the nature of a retainer for future services. *Flarty* v. *Odlum* (*a*), *Stone* v. *Lidderdale*. (*b*) The salaries of the judges are of the same description. They are granted not merely to support the dignity of the office, but to secure to the state the performance of important duties.

It is held that an annuity, *pro consilio impendendo*, cannot be assigned; but that an annuity *pro consilio impenso*, may. (*c*) This is precisely the distinction which applies to the present case; and while it restrains the alienation of the half-pay of officers, and the salaries of the judges, being provisions for future services, permits alienation in the instance of a grant like that to the Duke of *Marlborough*, designed as a reward for past services.

The same principle is recognized in the modern acts of parliament, by which pensions have been conferred on persons ennobled for services; and in particular in the late acts by which the honours and estates of the Duke of *Wellington* are settled. (*d*) The restrictive clauses in those acts expressly apply to alienations "other than those for the lives of the parties aliening;" not thereby enabling the persons in possession to alien for their own lives, but by restraining, recognizing, the general power of alienation, which, independently on the acts, they possessed.

If, however, the Court should entertain any doubt as to the pension, there can be none as to the estates. The original grant of the estate was to the Duke in fee.

(*a*) 3 *T. R.* 681. (*b*) 2 *Anstr.* 533. (*c*) See 1 *Dyer*, 2. a. n.
(*d*) Stat. 41 *Geo.* 3. c. 59. s. 6.; 42 *Geo.* 3. c. 113. s. 6.; 54 *Geo.* 3. c. 161. s. 28.

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The original grant of the title was in tail. (*a*) It cannot therefore be contended, that originally the grant of the estates was in support of the dignity. Then what was the effect of the statute of *Anne?* That statute proceeded upon the request of the Duke, that the estates, of which he was then seized in fee, as absolute owner, might be settled so as to accompany the title. (*b*) He was competent to make such a settlement himself, but any settlement made by him might be defeated by the recovery of a tenant in tail: all therefore that he asked of the legislature was, that it would give the same protection to his grant, that the statute of *Henry* VIII. had given to the grant of the crown. This was accordingly done by the statute of *Anne*, and in nearly the same terms used by the statute of *Henry*. There is not a word in the statute of *Anne* of the estates being limited for the support of the dignity; and any such expression would have been improper. This was the grant not of the crown or of the legislature, but of a subject, the Duke himself, who being at the time of the grant seized in fee of the estates, consented that for a particular purpose restrictions should be imposed upon his inheritance. The legislature has accordingly imposed restrictions in terms which it considered adequate to that purpose; and the Court in determining the effect of this contract, will not extend these restrictions beyond the terms. If the legislature had any further object, it is sufficient for the Plaintiff to say that it is not expressed.

The *dictum* from *Dyer*, on which so much reliance has been placed, is really inapplicable. It relates to what is called "creation money;" a grant which, when dignities ceased to be territorial, was substituted for the grant of territory, by which dignity was originally conferred. (*c*) An annuity of that description was therefore inherent in

(*a*) Stat. 5 *Ann.* c. 3. s. 1. & 3. (*b*) See the preamble.
(*c*) See *Cruise* on Dignities, ch. 3. s. 62. p. 87. Co. Litt. 83. b., and *Hargrave's* note, 5. *Madox's Baronia Anglica*, p. 141. note.

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the creation of the dignity, not, as in this case, arbitrarily annexed to it.

The LORD CHANCELLOR.

The decision on the question, Whether a receiver shall be appointed, will determine much of the rights of the parties. These grants were made for services performed, and for the support of dignities then created. The act (*a*) converts the Duke into a tenant in tail of estates of which he was then tenant in fee. If the legislature intended that the rents and profits should be enjoyed by the Duke for the time being, that conclusion will depend, I think, more on policy than on the terms of the act. Confining the construction to those terms, I am of opinion that the legislature has not used words sufficient to prevent alienation of the rents and profits. If such was the intention, *quod voluit non dixit.*

If on the construction of this statute creditors may have execution by writs of *elegit* against the estate, it must be competent to this Court to grant a receiver. But creditors can have no execution at law against the pension, and analogy to the law therefore will not support their claim in the instance of the pension, as of the land.

The clause specifying the acquittance of the Duke for the time being as the proper discharge, is introduced into the act in order to apprize the officer what voucher he is to produce when he passes his account; and also to subject him to an action for refusal of payment on tender of such acquittance; but if an assignee claimed to receive the pension, and the officer refused payment without the acquittance of the Duke, would he be subject to an action?

(*a*) 5 *Ann.* c. 3.

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On this day, the Lord Chancellor, without farther observation, granted the order for a receiver as to the estates, (without prejudice to the rights of the judgment creditors in possession,) but refused it as to the pension.

REDFEARN *v.* SOWERBY.

BOLTON *v.* TATE.

Feb. 12.

The Court will not order the personal representative of a deceased solicitor to deliver the papers in the cause to another solicitor, without payment, or security for payment, of the solicitor's bill. It seems that the summary jurisdiction of the Court extends to the representatives of a solicitor.

THE solicitor of the plaintiff having died, and his widow and administratrix refusing to deliver to the new solicitor the papers relating to the cause, unless security was given for the payment of the costs incurred, a motion was made, that the administratrix might be ordered, in a fortnight after notice, to deliver to the solicitor of *George Gibson*, the assignee of the Plaintiff under the insolvent debtor's act, all deeds, papers, and writings, in her custody or power, relating to this cause, or to any other suit or business of the plaintiff. The assignee and his solicitor undertaking to return all such deeds, papers, and writings to the administratrix, or to abide the order of the Court.

Mr. *Hart* in support of the motion.

Mr. *Joseph Martin* for the administratrix.

The LORD CHANCELLOR.

I recollect no instance of such a motion. If a party chuses that his solicitor shall not proceed, it would be vain for him to insist on taking the papers out of the solicitor's hands, till what is due to him has been paid. Here the disability arises by the act of God, and we are to consider the effect

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effect of that disability on the rights of the representative. You cannot take the papers from the administratrix without giving her security that her lien shall be discharged. The question is, Whether she is bound to facilitate the progress of the cause, unless that personal liability is satisfied, the proceedings being stayed, not by the default of any party, but by the act of God? I should regret to hold that I have no jurisdiction over the representatives of a solicitor, or that a suit in equity or an action is necessary; but I feel a difficulty in saying, that you can have the papers without discharging the lien.

Motion refused.

ROLLS. *Feb.* 16.

WILLIAM AKHURST and EDWARD BARR DUDDING, Assignees of JOHN PHILIPS, a Bankrupt, - - - - PLAINTIFFS;

AND

THOMAS JACKSON and JAMES HEUSTER, DEFENDANTS.

A sole trader having agreed, in consideration of a sum payable by instalments, to take two persons into partnership with him for a period of 18 years, and having become bankrupt five months after the commencement of the partnership, when only one instalment was due, his assignees are entitled, at the respective periods, to receive the remaining instalments.

IN *June* 1812, *Jackson* and *Heuster*, and the bankrupt *Philips*, by indenture of that date, mutually covenanted that they would be partners in the trade of a fishmonger, then carried on by *Philips* in *Bond-street*; the partnership to commence on the 29th day of that month, and continue during a period of 18 years, with a money capital of 2000*l.*, 1000*l.* to be contributed by *Philips*, and 500*l.* by each of the defendants; the partners being interested in the partnership stock, in proportion to their respective contributions of money-capital. In consideration of being ad-

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mitted into the business, the defendants agreed to pay to *Philips* 3500*l.*, of which 700*l.* were to be allowed to the defendant *Heuster*, for the good-will and stock of the trade then carried on by him as a fishmonger; 1000*l.* were to be paid on the 29th of *September* 1812; 1000*l.* on the 25th of *December* 1812; and the remaining 800*l.* on the 25th of *March* 1813.

The partnership between *Philips* and the Defendants accordingly commenced on the 29th of *June* 1812. In *November* following *Philips*, having committed an act of bankruptcy in the preceding month, was declared a bankrupt. The defendants had in the mean time paid 704*l.* on account of the sum of 3500*l.*

The bill filed by the assignees of *Philips* prayed an account of the effects and debts of the partnership, and of the balance due in respect of the sum of 3500*l.*, and a declaration that the Plaintiffs were entitled to such balance.

The Defendants by their answer admitted that when they agreed to become partners with *Philips*, they had been informed, and believed, that he was in a state of embarrassment, for want of a present sum of money to answer the demands of his creditors; but they denied that they had been informed by *Philips*, or knew, or believed, or had any reason to believe, that he was wholly insolvent, or unable to satisfy his creditors, except as aforesaid; on the contrary, they were informed by *Philips*, and had every reason to believe, that by the assistance of the money agreed to be paid to him, as a consideration for the partnership, he would be able to extricate himself from his difficulties. They admitted that *Philips* did not at any time represent to them that he was in good circumstances, or that his affairs were not involved to such extent as before-mentioned.

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The Defendants insisted, that as the consideration for the sum of 3,500*l.* totally failed by the bankruptcy of *Philips*, or at least such a proportion of the consideration so failed as was more than equivalent to the amount of the instalments which had not then become payable, the Plaintiffs, being unable to perform the contract for the performance of which the sum of 3,500*l.* was to be paid, were not entitled to the instalments unpaid at the time of the bankruptcy.

Mr. *Roupel* for the Plaintiffs.

The contract has been executed by the bankrupt, and his assignees are entitled to receive what remains unpaid of the price. The Defendants have had the benefit for which they contracted; they purchased the right of becoming the partners of *Philips*, and he admitted them into partnership. That partnership was in its nature subject to be determined by various contingencies, and among others by the bankruptcy of any of the partners. The Defendants cannot pretend that they purchased with an express guarantee against bankruptcy, or for the duration of the partnership during the full term of 18 years; they might as reasonably insist on a guarantee that the trade should be profitable. They purchased an uncertainty, and the mere fact that the event has been unfavourable affords them no title to be relieved in equity from the performance of their part of a contract which is admitted to be binding at law. The principle is familiar to the courts, and has prevailed in cases much stronger than the present. *Capper* v. *Mortimer* (*a*), *Lever* v. *Jackson.* (*b*) The case of *Ex parte Broome* (*c*), is a decision, that as between the parties, against fraud, the court will relieve; but the fair inference from that decision is, that relief is confined to the instance of fraud. In this

(*a*) 1 *Bro. C.C.* 156.
(*b*) 3 *Bro. C.C.* 605. and see *Coles* v. *Trecothick*, 9 *Ves.* 246.
(*c*) 1 *Rose* 69.

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transaction fraud is no ingredient; the Defendants admit that they knew *Philips* to be in a state of pecuniary embarrassment; they concluded the agreement on the calculation that if he could be relieved from that embarrassment, they would become partners in a profitable business, but with the knowledge, that his bankruptcy was an event not altogether improbable. The contract would not be vitiated by his insolvency at the time, if such were the fact. *Ex parte Peake.* (a)

Mr. *Bell* and Mr. *Wilbraham* for the Defendants.

Admitting that the covenants in this case are independent; and that the sum of 3,500*l.* being payable at a time long prior to the expiration of the partnership term, the Plaintiffs might recover at law without averring performance of the covenants on the part of *Philips* (b), the question is, Whether a court of equity will enforce a contract against a purchaser who cannot have the subject of his purchase. *Philips*, by implication at least, represented himself as a person capable of transferring the good-will of the trade annexed to his person; for that purpose he agreed to become a partner during the term of 18 years; within a few months after that agreement, by his own act, an act of bankruptcy, he dissolved the partnership, and disqualified himself for carrying on the business. Will the Court in such circumstances compel payment of the whole consideration? In equity, can any thing more be due than a proportion of the profits during the co-partnership? Had the money been paid, the remedy of the Defendants would have been by action at law for breach of covenant; but the whole question being now before a Court of Equity in taking the account, on what principle are they to be de-

(a) 1 *Madd.* 346.

(b) The cases on this subject are collected in *Selwyn, N. P.* v. 1. p. 480—491. 105—114., and in Serjeant *Williams'* edition of *Saunders,* v. 1. p. 320. n. 4. v. 2. p. 352. n. 3.

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prived of the advantage arising from possession of the money, and compelled to complete the contract on their part, when it has become impossible for the bankrupt to perform it on his? Suppose that a trader who had sold the lease of a trade carried on in leasehold premises, before the last instalment of the purchase money became due, surrendered the lease, would equity permit him to enforce payment? There is no case exactly in point, but the principle seems clear.

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The absence of authorities is a strong circumstance. In almost all partnerships a loss follows the bankruptcy of any of the partners; a thousand instances must have occurred of loss by bankruptcy in circumstances similar to the present, yet no precedent is produced of the interposition of a Court of Equity. The reason is evident. The loss is not a breach of the contract, but a contingency subject to which the parties purchased. The Defendants bought the right of becoming partners; they became partners; the partnership ended by an event by which it was, in its nature, liable to be determined. It cannot be pretended that *Philips* contracted that the partnership should continue during 18 years with a positive stipulation against bankruptcy, death, &c. For those events the parties might have provided by their agreement; but no such provision is made. I cannot venture to originate the doctrine that a Court of Equity ought to interpose to stop the payment of instalments conformably to the contract, because after the contract has been performed by admission to the partnership, that partnership is determined by bankruptcy. Upon admission, the whole price became, according to the terms of the agreement, *debitum in præsenti*, although *solvendum in futuro*. In equity, as well as at law, the contract has been performed, and the consideration must be paid. There is no proof of fraud: the Defendants had notice of

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Philips' embarrassment. The Plaintiffs are entitled to a decree, but this is not a case for costs.

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BELL v. FREE.

Two persons having jointly and severally granted an annuity, and mutually covenanted that each should pay one moiety, and indemnify the other against all "actions, suits, costs, charges, damages, demands, sums of money, and expenses," which might be incurred by reason of the non-payment thereof, one who on the insolvency of the other had made payments on account of his moiety, is not entitled to interest on such payments.

GEORGE CLARK and *Thomas Plummer* having jointly and severally covenanted to pay to *Frances du Puy* an annuity of 300*l.* for her life, executed mutual covenants that each would pay one moiety of the annuity, and indemnify the other against "all and all manner of action and actions, suit and suits, costs, charges, damages, demands, sum and sums of money and expenses whatsoever, which might be incurred by reason of the non-payment thereof, or of any part thereof, in the manner covenanted."

Clark having died intestate and insolvent, a bill was filed for the administration of his estate; and the master reported the sum of 1200*l.* to be due from *Clark*'s estate to *Plummer*, for payments made by *Plummer* on account of the intestate's moiety of the annuity. On this report *Plummer* presented a petition that he might be allowed the sum of 183*l.* 11*s.* 9*d.*, being the amount of interest on such payments at 4 *per cent. per annum.*

Mr. *Heald* and Mr. *Stephen* for *Plummer.*

Sir *Arthur Pigott*, Mr. *Hart* and Mr. *Winthrop*, against the petition.

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The question is, Whether, under the terms of this covenant of indemnity, the petitioner is entitled to interest on the sums advanced by him in discharge of the moiety of the annuity payable by the intestate; not whether interest might

might have been given by a jury (in the form of damages), or by the court, but whether it can be allowed by the master in the distribution of an insolvent estate. It is clear, by the course of practice, that the Master has no such authority. He is to compute interest on debts which carry interest, but he cannot allow it in the shape of damages. The case of a promisory note is a solitary exception, and as it seems, of recent introduction. I think that the petitioner would not be entitled to interest at law. As between the parties, although the contract is to pay the money and damages, there is no express contract to pay interest, nor any course of dealing from which such a contract can be implied. The case therefore is not within the rule proposed by Lord *Ellenborough* in *Havilland* v. *Bowerbank* (a), and confirmed by the Court of King's Bench in *De Bernales* v. *Fuller*. (b) In a subsequent case at law, *Gordon* v. *Swan* (c), which I mention to show the course of proceeding on this subject, the Court refused interest for delay of payment; Lord *Ellenborough* repeating his opinion, that the allowance of interest should be confined to bills of exchange and the like instruments, and to agreements reserving interest. I shall mention only one other case, that of *Rigby* v. *Macnamara* (d), which is extremely similar to the present. There *Powell* and *Rigby* being jointly bound for payment of 90,000*l.* to Messrs. *Drummond*, *Rigby* executed a counter-bond to *Powell*, in the penalty of 180,000*l.*, conditioned for indemnifying *Powell*, his executors, &c., against all costs, charges, damages, &c., which he or they might sustain on account of the non-payment of the sum of 90,000*l.* and interest, or by reason of *Powell* having executed the joint-bond, in any wise howsoever. *Powell*'s executors having paid large sums for principal and interest of the 90,000*l.*, Lord *Thurlow* held that against *Rigby*'s estate they could claim no more than

(a) 1 *Campb.* 50. (b) 2 *Campb.* 426.
(c) 12 *East*, 419. (d) 2 *Cox.* 415.

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Messrs. *Drummond*, and were therefore entitled to interest on the payments on account of principal only, but not on the payments on account of interest. In that case the general words of indemnity were held not to entitle the surety to interest, although secured by a penalty. The concluding passage of the judgment (*a*) seems to imply, that it was not then the practice for the Master to compute interest on promisory notes.

On these authorities it is extremely clear that the Master was right in refusing interest, and that part of the petition must be dismissed.

(*a*) P. 420.

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COOPER *v.* THORPE.

Under an act for inclosing lands in the townships of *A.*, *S.*, and *W.*, directing the commissioners to allot to the rector of the parish of *W.*, in lieu of the tithes of the townships of *S.* and *W.*, so much of the lands to be enclosed in the township of *S.*, and of the titheable parts of the township of *W.*, as should, quantity, quality, and situation considered, contain or be equal in value to two-fifteenth parts of the titheable places thereof, and to make to the rector of *W.* and the vicar of *B.*, in lieu of the tithes of a part of the lands in the townships of *S.* and *A.*, to which they were entitled, a like allotment, equal to two-fifteenths of such lands, and declaring that after the enrolment of the award of the commissioners, all tithes arising within the lands enclosed should cease, an award by which the commissioners allotted to the rector of *W.*, "in lieu of the tithes of *S.* and *A.*," lands more in quantity than two-fifteenths of the lands enclosed in *S.* and *A.*, but less than two-fifteenths of the lands enclosed in *S.*, *A.*, and *W.*, without any allotment in lieu of the tithes of *W.*, is a bar to the claim of tithes in *W.* The award would not be vitiated by error in the allotment. The act having directed the commissioners, in estimating the proportion, to have regard to quality and situation, deficiency in quantity is not proof of error.

BY an act of parliament 9 *Geo.* 3. c. 51., "for dividing and enclosing certain open fields, lands, and grounds, in the several townships of *Atterby*, *Snitterby*, and *Waddingham*, in the county of *Lincoln*," reciting among other things, that within the township of *Atterby*, in the parish of *Bishop Norton*, and within the townships of *Snitterby* and *Waddingham*, in the parish of *Waddingham*, were several open and uninclosed arable fields, common pastures, carrs, and waste grounds, or other open and common lands and grounds, distinguished by several names, containing in the whole

3000

3000 acres, or thereabout; that *Robert Carter*, clerk, was rector of the parish of *Waddingham cum Snitterby*, and as such seized of certain glebe lands in the said open fields and grounds, and entitled to all the tithes, great and small, arising within the titheable places of that parish, and also to the tithes arising upon certain parcels of land lying dispersed in the open fields of *Atterby*; and that *George Jolland*, clerk, was vicar of *Bishop Norton*, and as such seised of certain glebe lands in the said open fields and grounds, and entitled to all the rest of the tithes, great and small, arising within the titheable places of the township of *Atterby*, and also to the tithes arising upon certain parcels of land lying dispersed in the open fields of *Snitterby*; it was enacted, "that all the said open arable fields, common pastures, carrs, and waste grounds, or other open and common grounds in the said several townships, should be divided, set out, and allotted," by certain commissioners, in manner after declared; that such person as the commissioners should appoint should, at or before a time fixed, take, and lay before the commissioners, a survey and admeasurement of the lands directed to be enclosed within the townships of *Atterby*, *Snitterby*, and *Waddingham*, and also of the ancient enclosed lands within the townships of *Atterby* and *Snitterby*, containing the number of acres, roods, and perches, in the said several townships, and of each proprietor's respective share thereof; that the commissioners and surveyor should have power to enter upon, survey, and admeasure, the lands to be enclosed within the townships of *Atterby*, *Snitterby*, and *Waddingham*, and the ancient inclosed lands in the townships of *Atterby* and *Snitterby*, but not any ancient enclosed lands in the township of *Waddingham*: that in case any doubt should arise concerning the claim of any of the proprietors, or any dispute between them concerning their respective shares, rights, and interests in the lands to be enclosed, or the tithes arising upon the same, or the shares which they ought to have upon the intended division, the commissioners should, by exam-

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examination of witnesses, upon oath, and upon other proper and sufficient evidence, inquiry, and satisfaction, hear and determine the same; and such determination should be binding and conclusive to all parties.

The act then directed the commissioners, within six months after such survey should have been laid before them, or as soon after as conveniently might be, in the first place to allot to *Carter* and his successors, rectors of the parish of *Waddingham cum Snitterby*, such parcels of the arable fields, common pastures, and carrs, within the township of *Snitterby*, (except the common pasture called the *Carr* side,) directed to be enclosed, as should, in their judgment, be equal in value to, and a full satisfaction for the present glebe lands, of the rector within the last-mentioned lands to be enclosed; and then to allot to *Carter* and his successors, rectors as aforesaid, such parcel or parcels of the residue of the same arable fields, common pastures, and carrs in *Snitterby*, and also of the titheable parts of the township of *Waddingham*, as should (quantity, quality, and situation considered) contain, or be equal in value to two-fifteenth parts of the titheable places of the last-mentioned lands and grounds, in lieu of and as a full compensation for all the tithes, dues, duties, and payments whatsoever, belonging to the said rector, and arising within the same lands and grounds; and further to allot to *Carter* and his successors (rectors as aforesaid) such parcel or parcels of the arable fields of *Snitterby* as the commissioners should (quantity, quality, and situation considered) adjudge to be equal in value to the tithes of the ancient inclosed lands in *Snitterby*; and then to allot to *Jolland* and his successors, vicars of *Bishop Norton*, such parcels of the arable fields, common pastures, and carrs, within the township of *Atterby*, directed to be enclosed, (except the common pasture called the *Carr* side) as should, in the judgment of the Commissioners, be equal in value to, and a full satisfaction for, the present glebe lands of the said vicar, in the last-mentioned

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lands; and also to allot to *Jolland* and his successors, vicars as aforesaid, such parcels of the residue of the same arable fields, common pastures, and carrs in *Atterby*, as should (quantity, quality, and situation considered) contain, or be equal in value to, two-fifteenth parts of the same fields, and in lieu of, and as a compensation for, all the tithes, &c. whatsoever arising within the arable fields, common pastures, and carrs of *Atterby*, (except as before excepted); and then to allot to *Jolland*, and his successors, vicars as aforesaid, such parcels of the last-mentioned arable fields as the commissioners should (quantity, quality, and situation considered) adjudge to be equal in value to the tithes of the ancient enclosed lands in *Atterby*; and further to allot to *Carter* (rector as aforesaid), and *Jolland* (vicar as aforesaid), such parcels of the common pasture called the *Carr* side pasture, as (quantity, quality, and situation considered) should contain, or be equal in value to, two-fifteenth parts of the titheable grounds therein contained, in lieu of, and as a full compensation for, all tithes, &c. arising within the said *Carr* side pasture, and respectively belonging to the rector and vicar as aforesaid; which last-mentioned two-fifteenth parts should be divided between the rector and vicar and their successors respectively, in such manner, and in such proportion as the commissioners should adjudge to be adequate in value to their respective shares and interests in the last-mentioned tithes; and moreover to allot to the said rector and vicar, and their successors, such parcels of the residue of the arable fields of *Atterby and Snitterby*, as in the judgment of the commissioners should, (quantity, quality, and situation considered) contain, or be equal in value to, two-fifteenth parts of the lands lying dispersed in the arable fields of *Atterby* and *Snitterby*, the tithes whereof respectively belonged to the said rector and vicar, in lieu of, and as a compensation for, the last-mentioned tithes, which lands so to be allotted, as last expressed, should be divided between the rector and vicar, and their successors respectively, in such manner and proportion as the commissioners

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missioners should adjudge to be adequate in value to their respective shares and interests in the same tithes.

After prescribing the mode of allotting the residue of the lands among the persons interested, the act directed, that the commissioners, in making the several allotments of such parts of the lands as were lying within the *Carrs* belonging to the respective townships, should have regard more especially to the quantity, quality, and species of the lands belonging to each proprietor or party interested therein, and to the state and condition of such lands with respect to drainage, at the time of making such allotments, by reason of the charge to which such allotments would be subject by the annual rate or assessment directed to be laid thereupon by an act of parliament, 7 *Geo.* 3., for draining the lands lying within the level of *Ancholme*, (of which the lands within the carrs are part,) and the allotments so to be made to each proprietor or party interested in the carrs should contain, as near as the circumstances of the case would admit, the same quantity or proportion of dry land not liable to be flooded, and of such other species of land respectively as such proprietor or party interested was possessed of or entitled to at the time of making such allotments, and as near as might be, in the same state, quality, and condition, so that the several shares of the proprietors of, or persons interested in, the lands within the carrs, might not, after such allotments, be subject to the said annual rate or assessment in any greater or less proportion with respect to the value of each of the said shares than the same were subject to at the time of passing the act; and that the commissioners in making the several allotments of the residue of the lands to be enclosed should have regard to the situation and quality, as well as quantity, of the lands belonging to each person interested, and to the right of common and other property of every such person, and also to the situation and quality, as well as quantity, of the lands to be allotted in lieu thereof; and the share or shares to be allotted

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to each of the proprietors of the said residue of the lands, should be allotted as near as conveniently might be to the messuages, cottages, or other lands or tenements belonging to the parties respectively.

The act then provided, that within six months after the commissioners had completed the allotments, or as soon after as conveniently might be, they should draw up an award or instrument in writing, which should express distinctly, and separately, the quantity of acres, roods, and perches, contained in the arable fields, common pastures, carrs, and waste grounds, and the quantity and contents, situation, buttals, and boundaries of the several parcels and allotments respectively by them set out and assigned by virtue of the act, and also the situation, buttals, and boundaries of the respective townships of *Atterby*, *Snitterby*, and *Waddingham*, which award or instrument should be engrossed on parchment, and signed and sealed by the commissioners, and should, within six months after the execution thereof, be enrolled by the clerk of the peace for the division of *Lindsey;* and the several allotments and divisions, and all orders, directions, regulations, and determinations made as aforesaid, and declared in the award, should be binding and conclusive upon all the parties interested; and "immediately after the enrolment of the said award, all manner of tithes, ecclesiastical dues, duties, and payments, of what nature or kind soever, arising, renewing, encreasing, payable, or happening within or out of the lands and grounds thereby directed to be enclosed, or within the said ancient enclosed lands or grounds, or otherwise howsoever, shall cease and for ever be extinguished."

A subsequent clause provided, that any person who should think himself aggrieved by any thing done in pursuance of the act, (other than and except such orders and determinations of the commissioners, which were declared

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to be final,) might appeal to the next general quarter session of the peace for the division of *Lindsey*; and the determination of the justices should be conclusive.

By their award duly enrolled, the commissioners allotted to the rector of *Waddingham* 326 acres within the parish; namely, 33 acres, 3 roods, and 32 perches, as a compensation for the glebe land and right of common; 223 acres, 1 rood, and 32 perches, "in lieu of and as a compensation for all the tithes, dues, duties, and payments belonging to him within the open fields, common pastures, and carrs of the townships of *Snitterby* and *Atterby*;" 17 acres and 2 perches for the tithes of the ancient enclosed lands in *Snitterby*; and 51 acres, 1 rood, and 33 perches, for the ancient glebe lands and rights of common in the north *Carr*, south *Carr*, *Carr* side, and the acre field in *Waddingham*.

The lands enclosed under the act were, in *Snitterby* 1532 acres, 3 roods, and 34 perches, and in *Waddingham* 1279 acres and 39 perches. Of the lands enclosed in *Snitterby*, after deducting the allotment for glebe and rights of common, two-fifteenths amount to about 200 acres; and of the lands enclosed in *Waddingham*, after deducting the like allotment, two-fifteenths amount to about 160 acres.

The bill was filed by the rector of *Waddingham cum Snitterby*, against occupiers of lands within the township of *Waddingham*, for an account and payment of tithes. The Defendants, by their answer, stated the act of parliament and the award, and insisted, that although the allotment in lieu of tithes was not expressed to be made in respect of lands enclosed under the act in the township of *Waddingham*, yet those lands were exempted by the award; the allotment being designed by the commissioners as a compensation

pensation for the tithes of all the lands within the operation of the act, and greatly exceeding what the rector was entitled to in respect of the tithes of the townships of *Snitterby* and *Atterby* only.

Mr. *Bell* and Mr. *Shadwell* for the Plaintiff.

The allotment in lieu of tithe having been expressly made for the tithes of the townships of *Atterby* and *Snitterby* only, is not a bar to the rector's claim for the tithes of *Waddingham*. The allotment of land in *Waddingham* is expressed to be in compensation of glebe and right of common only. The award, therefore, not containing a compensation for the whole tithe is not such as the act required. An award must conform to the submission. If a person carrying on business as a merchant, engages in working a lead mine, and in a colliery, and has accounts in each of those concerns with the same individual, on a reference of the question what is due, should the arbitrators award a sum due on the mercantile account, another sum on the mine account, and omit to state what is due on the colliery account, the award is void. The question here is, Whether, when the commissioners make an allotment in lieu of the tithes of *A.* and of *B.*, but make no allotment in lieu of the tithes of *C.*, the Court will consider their award as a bar to the tithes of *C.* It cannot be contended that the commissioners designed the allotment as a compensation for the tithes of *Waddingham*, for they have expressly declared it to be a compensation for the tithes of *Snitterby* and *Atterby*. No such award therefore exists as is required by the act; and the existence of such an award is a condition precedent to the operation of the act in extinguishment of the right to tithes.

Mr. *Hart* and Mr. *Stephen* for the Defendants, insisted on the express terms of the act as constituting the award a

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bar to the claim of tithes for every part of the lands within its operation.

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The Plaintiff having substantiated his character of rector, and the occupation by the Defendants of lands within the parish from which titheable matters arise, has established a *prima facie* title to the tithes. The defence is, a local act of parliament passed in 1769 for the enclosure of lands in three townships, two within the parish of *Waddingham*, and the third contiguous. The Defendants offer this as a complete bar to the rector's claim; insisting, that from the enrolment of the award of the commissioners, tithes are to cease on the lands enclosed, and that the execution and enrolment of the award, and the situation of the lands in question, within the operation of the act, being proved, by its distinct and positive terms, the right to tithes is extinguished.

The words on which they rely are, that "immediately after the enrolment of the award, all manner of tithes arising, &c. within or out of the lands directed to be enclosed, shall cease and for ever be extinguished." (*a*) That is offered as a parliamentary exemption of the lands in question; and such it certainly appears, on production of the award, and proof that the lands are within the operation of the act. It is then alleged by the rector, (not disputing that the award would be a bar, were it such as the act proposed, that is, had the allotments been such as were prescribed,) that to render the award a bar to the right of tithes, it must provide a satisfactory compensation for that right, and by the terms of the act, that satisfactory compensation is ascertained to be two-fifteenths of the land in

(*a*) See the clause, ante, p. 97.

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the different townships; and he insists that the award not containing allotments in value or quantity conformable to that description, cannot operate in extinguishment of his rectorial claim. The case thus presents three distinct questions: 1. Whether it is competent to the rector now to inquire into the propriety of the allotments? 2. Whether he has proved that the award is not such as the act proposed, that is, that the allotments are not such as the rector was entitled to receive? 3. Whether, if he establishes both those propositions, the consequence is that the award is invalid?

It is not necessary to examine the first question. Admitting for the present the competence of the rector to inquire into the propriety of the allotments, has he shown sufficient to impeach the judgment of the commissioners? It appears that they entered on their duty; that an allotment of about 300 acres was made to the then rector, was accepted by him, and has been enjoyed by his successors ever since; and that the quantity of that allotment was the subject of inquiry and adjudication by the commissioners. A Court reviewing the judgment of any legitimate tribunal, is bound to presume *omnia ritè acta*, much more when that review is undertaken after the lapse of half a century. It is sufficient for those who rely on the judgment to produce it; it cannot be impeached without clear and indisputable evidence of error. The subject of adjudication in the present case happens to be involved in considerable obscurity. The rectory was pecularly circumstanced. The parish of *Waddingham cum Snitterby* being contiguous to the township of *Atterby*, within the parish of *Bishop Norton*, the vicar of *Bishop Norton*, and the rector of *Waddingham*, both possessed interchangeably rights in the lands of *Atterby* and *Snitterby*. The act therefore of necessity provided, in the first instance, an united compensation, (which it fixed at two-fifteenths,) and then a division of that compensation. In the description of the lands also,

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an obscurity appears, some part of the parish of *Waddingham* not being titheable. It is clear that all the ancient enclosed lands of *Waddingham* were to remain untouched. In directing surveys of ancient enclosed lands, the act expressly excepts those in the township of *Waddingham*. Whatever belonged to them, as to which there is no evidence, they are constantly omitted, and cannot be included. Nor were all the unenclosed lands of *Waddingham* to be comprehended within the operation of the act. The allotment of two-fifteenths is directed to be made of the titheable parts of the township of *Waddingham*. (a) Having first therefore excluded the ancient enclosed lands of *Waddingham*, the act subjoins a further qualification, that the allotment should be made of the titheable parts only of the unenclosed lands, leaving it of necessity to the tribunal which it has constituted, to determine what fall under one description, and what under the other. The commissioners, therefore, laying out of the question all the enclosed lands, and all about to be enclosed which they should find to be not titheable, were to set out two-fifteenth parts of the remainder; but in the estimation of that proportion the act expressly directs that quality and situation, as well as quantity, should be considered; and seeming to contemplate a district, the parts of which, some being subject to floods and to a drainage tax, were of very unequal value, studiously calls the attention of the commissioners to those circumstances in a distinct section for that purpose. This complex question then of the adequacy of the allotment was submitted to the consideration of the commissioners; and, I think, submitted without appeal. By the express terms of the act, all disputes concerning rights in the lands to be enclosed, or the tithes arising from them, are to be determined by the commissioners, and their determination is to be final. The subsequent clause, which gives a right of appeal to the quarter sessions, contain-

(a) See the clause, ante, p. 94.

ing an exception of cases in which the award is conclusive, cannot extend to the allotments. The commissioners are authorized to adjudicate finally on the subject of quantity, quality, liability to tithe; those points they must have considered had they duly exercised their power; and I am bound to suppose them so to have done, and to give them credit for a just adjudication. Nor can it be supposed that the rector failed to submit to their consideration whatever was required for enabling them to assign to him a proper allotment.

But it is said that the impropriety of the allotment is in proof: first, by computation it is found to be deficient in quantity, to the extent of about 140 acres; secondly, in the award no reference is made to the tithes of *Waddingham*, and if any lands there were titheable, no compensation having been given for them, the rector has not received the indemnity provided by the act. I have anxiously considered whether it is possible now to determine that the rector had or had not a due allotment. In description, on the face of the award there is no reference to the tithes of *Waddingham*; it cannot however be said that no regard was had to to that township, for an allotment is expressly made of lands enclosed there, in respect of the *Carr* side pasture, &c. But in quantity there seems a deficiency. The allotment to the rector was more than two-fifteenths of the whole, omitting *Waddingham*, but less than two-fifteenths, including that township. If quantity is the criterion, therefore, there is error; but how does it appear that the deficiency in quantity was not compensated by superiority in value? Or, how can it be known what evidence was produced to shew which of the lands included were titheable, and which not? If the larger, or a considerable, part of the unenclosed lands in *Waddingham* was not titheable, as to which we have no evidence, undoubtedly there would be great error in undertaking to determine, by comparison of quantity alone, the adequacy or inadequacy of the allot-

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ment. Supposing the error only in description, and that an allotment of two-fifteenth parts was made to the rector, such error in description, more especially in a parish so circumstanced, would not vitiate an award, under which, the rector having had his full compensation, quantity and value considered, no injustice would be done. At this distant period, we examine the transaction with very imperfect materials; the lapse of time occasions great difficulty in determining what were the data or principles which guided the commissioners. On that subject we can only conjecture; but this we know, that the allotment was made, was accepted by the rector, and has been constantly acquiesced in since without dispute, till the institution of the present suit. If, as is said, it has in point of enjoyment been departed from, no complaint was ever made that the commissioners failed in their duty. On this question, then, I am obliged to say, that the rector has not, by clear and satisfactory evidence, impeached the judgment of the commissioners, and shown error in the award.

Had it depended on that point, a question might arise what course should be pursued; but I have never entertained a doubt, that under this claim there is no necessity for adverting to that part of the case, being clearly of opinion that if an error were proved, in the omission of a proper allotment, yet on the construction of the act, the bar which it creates is insuperable. It is an independent substantive bar to the claim of tithes in kind for ever; not conditional, but positive. The legislature has declared that after a certain event tithes shall cease; what is that event? The enrolment of the award. From that time the tithes are extinguished. The proposition of the rector is, that the bar does not arise if he can show error in the award. That argument confounds two things perfectly distinct; the existence, and the justice, of the award. The act designed not to leave to the parties the right, at any future time, to question the adjudication of the commissioners,

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sioners, but declared it final and conclusive. Consider the consequence of a contrary decision. Under the act the award cannot be bad as to the rector, and good as to others. In order to succeed, he must show that there is no award enrolled; for if there is, his case fails. His argument is, that because there is an error in the allotment, it ceases to be an award. Then there is nothing to determine the interest in these 3000 acres: the incumbent has a title to tithes on all the lands, and the rights stand as if the act had not been passed. On that principle, if any one proprietor can show error in respect to him, one, perhaps, of 300 or 400 claimants, and whether he brought forward his claim or not, the moment it appears that there is a right not compensated which it was intended to compensate, there is no award; so that this instrument, which was to be the *lex loci*, to determine every man's right and title, the binding rule to govern the property for ever, with a positive direction that the decisions which it records should be conclusive, is at an end, because there is error. The consequences of such doctrine refute it; but the terms of the act are clear. The commissioners are directed to allot to different individuals, and having finished the allotments, to draw up their award, which is an instrument recording their judgments antecedently pronounced, good or bad; if the instrument contains that, it is the award; on the enrolment of that instrument the tithes cease. Is not this the award? and has it not been enrolled? The vice of the argument consists in the assumption, that because error can be proved in an allotment there is no award. The act intending to terminate all litigation, to define interests, and to extinguish rights to common and to tithes, on that event, directly puts an end to the claim to tithes. It is quite clear that whatever error there might be in the previous allotments, the existence of the award concludes the question. On this ground, it appears to me, that the defendants have completely succeeded in establishing an imperative and decisive bar to the rector's claim.

I think,

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I think, then, that it is not competent, at this distance of time, to examine the propriety of the award; that the rector has not clearly established the existence of error; and that the error alleged, error in the allotment, rather than in the award, would not defeat the bar. The bill must be dismissed, but without costs. The apparent deficiency of quantity, and the former submission of the defendants to pay tithes in kind, justified the rector in the institution of this suit.

ROLLS.
Feb. 24.

MARIE SEBASTIENE SOPHIE BATTERSBEE, Widow, - - - - - PLAINTIFF;

AND

HENRY FARRINGTON, EDWARD VERNON, THOMAS BATTERSBEE, PHILIP CODD, JAMES TILSON, and SYLVESTER DOUGLAS WILSON, and SOPHIA, his Wife, DEFENDANTS.

A voluntary settlement without fraud, by a husband not indebted, in favour of his wife and children, is valid against subsequent creditors. On a bill by the wife, the Court established the settlement, no creditor attempting to impeach it, and there being no allegation that the husband was indebted at the time, without directing an inquiry on that subject. It seems that a recital in a settlement after marriage is not evidence against creditors of articles before marriage.

THE bill filed in *May* 1813 stated, that by articles of agreement, dated 1st *October* 1793, made in contemplation of marriage between the Plaintiff and *Edmund Battersbee* deceased, and executed by *Edmund Battersbee*, the Plaintiff, and *William Sanford*, *Edmund Battersbee* covenanted with *Sanford*, that in case the marriage should take effect, he would, within three months after the solemnization thereof, assure to, or to the use of, the Plaintiff, (in case she should survive him) an annuity of 500*l.* for her life, to commence from the day of his death; and the Plaintiff agreed that the said annuity should be in bar of dower, and of all claim to any part of the personal estate of *Edmund Battersbee*, under the statute of distribution or

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otherwise; that in 1793, shortly after the date of the articles, the marriage was solemnized, and after the solemnization, in performance of the articles, *Edmund Battersbee*, by an indenture executed on the 31st *December* 1793, between himself, the Plaintiff, and *Sanford*, reciting the articles, in pursuance and performance thereof, and in consideration of the marriage, covenanted with *Sanford*, that he, *Edmund Battersbee*, in his life-time, or his heirs, executors, and administrators, within four months after his decease, in case the Plaintiff survived him, would transfer into the joint names of trustees, so much Government, or India stock, or annuities, or otherwise convey such lands or hereditaments, as would secure to the Plaintiff, in case she survived him, an annuity of 500*l.* for her life, in bar of dower, and all other claim which she might have as his widow, upon his estate, either real or personal; that in or about *September* 1809, *Edmund Battersbee* being seised of certain freehold, and possessed of certain leasehold, estates, determined to perform the articles of agreement and indenture of covenants, by conveying certain estates to trustees upon the trusts mentioned in the articles and indenture; that upon search being made for the purpose of preparing the necessary deeds, the articles and indenture appeared to have been mislaid, and neither of them could be found; that *Edmund Battersbee* having forgotten what were the provisions contained in the articles and indenture, and conceiving that the agreement entered into by him was to assure the yearly sum of 400*l.* to the Plaintiff (in case of her surviving him) during her widowhood, instead of 500*l.* for her life, accordingly gave directions for preparing the necessary deeds to carry into effect the articles and indenture, according to the erroneous idea which he entertained thereof; and thereupon indentures of lease and release were executed on or about the 13th of *September* 1809, by which *Edmund Battersbee* conveyed to *Henry Farrington* and *Edward Vernon*, certain freehold and leasehold estates upon trust, during the life of

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of *Edmund Battersbee*, at his request, and after his decease at any time during the widowhood of the Plaintiff, in case she should survive him, at her request, and after the decease, or the next marriage of the Plaintiff, which should first happen, then, at their discretion, to raise by sale, or mortgage of the said premises, such sum or sums as the persons by whose request the sale or mortgage was thereby authorised to be made, should think proper; and to stand possessed thereof upon the trusts declared by another indenture of the same date; and upon trust in the mean time to permit *Edmund Battersbee* to receive the rents during his life; and after his decease to pay to the Plaintiff, in case she should survive him, an annuity of 400*l.* during her widowhood, and subject thereto to stand possessed of the rents and profits in trust for the persons entitled under the other indenture of the same date, to the interest of the trust monies therein mentioned; that by the deed referred to in the last indenture of the same date, *Edmund Battersbee* directed *Farrington* and *Vernon* to stand possessed of the monies to be produced by the sale or mortgage before mentioned, (after certain deductions) upon trust to invest the same in Government or real securities, and permit *Edmund Battersbee*, during his life, to receive the dividends and interest; and after his decease, in case the Plaintiff should survive him, to appropriate so much of the trust monies as would produce the clear yearly sum of 400*l.*, and pay the income thereof unto the Plaintiff during her widowhood, in lieu of the annuity of 400*l.* provided for her by the indentures of lease and release before mentioned, and to pay and assign the residue of the trust monies, and also after the decease or next marriage of the Plaintiff, such part as should be appropriated as aforesaid, to his son, *Thomas Battersbee*, to be vested when he should attain the age of 21 years, if he should survive his father; and in case of his death under that age, or in the life of his father, then to *Sophia Battersbee*, his daughter, to be vested when she should attain the age of 21 years; and in

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case of her death under that age, or in her father's life, then upon such trusts as *Edmund Battersbee* should appoint.

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The bill farther stated the will of *Edmund Battersbee*, dated 24th *September* 1809, and executed and attested so as to pass real estates, by which, after directing that all his debts should be paid as soon as conveniently might be, and confirming the settlement made for the benefit of the Plaintiff and of his children, by the two deeds of the 12th and 13th of *September* then instant, and after giving, among other legacies, 1000*l.* to the Plaintiff, and 5000*l.* in trust for his daughter, he gave all the residue of his personal estate, over which he had any power of appointment or disposition, to his son, *Thomas Battersbee*, if and when he should attain the age of 21 years; but in case he should die under that age, then to his daughter *Sophia*, if and when she should atttain the age of 21 years, or be married with the consent of her guardians; and in case she should die under that age, and before she should be married with such consent, then he gave his residuary estate to *Henry Farrington*; and he appointed the Plaintiff, and *Henry Farrington*, and *Edward Vernon*, executrix and executors of his will.

The bill then stated, that after the execution of the several deeds, and the will before mentioned, the indenture of covenants of the 31st of *December* 1793 was found, but the articles of agreement, in pursuance of which the same was made, were never found; that upon looking into the said indenture, *Edmund Battersbee* having discovered that the lease and release, and declaration of trust before mentioned, were not a performance of the articles, determined to execute a new deed conformable thereto; and accordingly by an indenture executed on the 25th of *March* 1812, it was, in pursuance and performance of the articles, delared to be their true intent and meaning, and *Edmund Battersbee* directed and appointed, that *Farrington* and *Ver-*

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non should be seised and possessed of the said hereditaments and premises, subject to the trust for sale or mortgage, and in the mean time to the trust declared for the benefit of *Edmund Battersbee* during his life, upon trust, after the decease of *Edmund Battersbee*, and during the life of the Plaintiff, in case she should survive him, and whether she should continue his widow or not, out of the rents and profits, or by sale or mortgage of the estates, to pay to the Plaintiff an annuity of 500*l.* in lieu of the annuity of 400*l.*, and in satisfaction of the annuity mentioned in the articles; and the trustees were directed, in case the Plaintiff should survive *Edmund Battersbee*, to appropriate so much of the trust monies as would produce an annuity of 500*l.*, and pay the income thereof to the plaintiff for her life, in lieu of the annuity of 500*l.* thereinbefore provided for her.

The bill farther stated, that in *November* 1812 *Edmund Battersbee* died, leaving the Defendant, *Thomas Battersbee*, an infant, his heir at law, and leaving his daughter *Sophia*, who had, previously to his death, and with his consent, married the Defendant *Sylvester Douglas Wilson*; (*Edmund Battersbee*, by the marriage settlement, having covenanted to bequeath 5000*l.* in trust for his daughter, her husband, and their children;) and that at the respective times of making his will and of his death, *Edmund Battersbee* was seised in fee of real estates, beside those comprized in the trust deeds before mentioned, which descended to his heir at law.

The bill, after stating that *Farrington* and *Vernon* had, with the concurrence of the Plaintiff, contracted to sell the trust estates before mentioned, charged, that the testator was a trader within the meaning of the bankrupt laws at the time of his death, and that his real estates were therefore in his life-time subject to the payment of his debts as well by simple contract as by specialty, and were legal assets for that purpose.

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The prayer of the bill was, that an account might be taken, of the real and personal estates of the testator *Edmund Battersbee*, (distinguishing the estates conveyed in trust, as before mentioned, from his general estate) and of his debts and legacies; that the real estates descended upon the Defendant *Thomas Battersbee*, might be declared to be subject to the debts of the testator by reason of his having been a trader at the time of his decease, and that the assets might be marshalled; that the Plaintiff might be declared entitled out of the money to arise from the sale of the trust premises to have one annuity of 500*l.* raised and paid to her, and in case the interest and dividends of such money when invested in the funds should not be sufficient, that a part of such money might be laid out in the purchase of such an annuity as, together with the interest of the residue of the money, would make up the yearly sum of 500*l.*; that she might be declared to have a specific lien as a specialty creditor upon the trust estates, and the money arising from the sale thereof, to the extent of 500*l.* *per annum;* and that the rights of the claimants under the will might be ascertained, and the trusts carried into effect.

The Defendants, *Farrington* and *Vernon*, by their answer stated, that they knew not whether any articles had been executed before the marriage of the Plaintiff with the testator, as alleged in the bill; and that the testator's personal estate was not sufficient for the payment of his debts, funeral expenses, and legacies; and they admitted that they had contracted for the sale of the real estates.

Sir *S. Romilly*, Mr. *Cooke*, and Mr. *Collinson*, for the Plaintiff.

The settlements subsequent to the marriage, being executed in pursuance of previous articles, are supported by a good consideration. Of the existence of those articles, though not now to be found, the recital in the settlement is conclusive

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conclusive evidence. *Anon. Pre. in Cha.* (a), *Dundas* v. *Dutens.* (b)

Without reference to the articles, the settlement possesses intrinsic validity. It is not proved that the settler was indebted at the time, and it is fully established that a voluntary settlement by a husband after marriage without fraud is not within the statute (c), and cannot be impeached by subsequent creditors. *Stephens* v. *Olive* (d), *Lush* v. *Wilkinson* (e), *Montague* v. *Sandwich* (f), *Kidney* v. *Coussmaker* (g), *Holloway* v. *Millard.* (h)

Under the favourable circumstances of this case, and in the absence of a suggestion that the settler was indebted at the time, the Court will not direct an inquiry into that fact, but at once establish the settlement.

Mr. *Horne* and Mr. *Temple*, for Mr. and Mrs. *Wilson.*

The settlement cannot be questioned except in a suit by creditors. On this record nothing appears to impeach it. In the absence of proof, or even allegation, of the existence of debts at the date of the deed, the Court will not proceed conjecturally on the mere possibility of debt.

Mr. *Rose*, for the Defendants *Codd* and *Tilson*, trustees in the marriage settlement of Mr. and Mrs. *Wilson.*

Mr. *Hart* and Mr. *Wilbraham*, for the trustees and executors.

(a) P. 101.

(b) 1 *Ves. Jun.* 196. *Cordwell* v. *Mackrill*, *Amb.* 515. and *Holmes* v. *Ailsbie*, 1 *Madd.* 551. were also cited.

(c) 13 *Eliz.* c. 5. (d) 2 *Bro. C. C.* 90. (e) 5 *Ves.* 384.

(f) Cited 12 *Ves.* 148. (g) 12 *Ves.* 136.

(h) 1 *Madd.* 414. and in *Partridge* v. *Gopp*, 1 *Eden.* 163., the decree proceeded on the ground that the party was largely indebted at the time of the gift.

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The trustees offer no opposition to the claim of the Plaintiffs, but are desirous that the Court shall be apprized of the facts of the case before it pronounces a decree. No evidence is adduced of the execution of the articles. On the supposition of their existence, the deed of 31st *December* 1793, which recites them, is nugatory, and does no more than had already been done by them. The deed of 1809, executed after so long an interval, and conveying recently before his death a large portion of his property in trust for sale, affords a presumption that the settlor was indebted at that time. The trustees submit the propriety of ascertaining that fact by an inquiry before the Master. A voluntary bond cannot prevail against a simple contract debt (*a*); on what principle can greater effect be given to a voluntary settlement?

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No doubt can be entertained on this case, if the settlor was not indebted at the date of the deed. A voluntary conveyance by a person not indebted, is clearly good against future creditors. That constitutes the distinction between the two statutes. (*b*) Fraud vitiates the transaction; but a settlement not fraudulent, by a party not indebted, is valid, though voluntary. On the first question, (which I am not now to decide,) the distinction, I apprehend, is, that against all persons claiming under the settlor the recital is conclusive (*c*); but it would be difficult to maintain, that a recital in a post-nuptial settlement of ante-nuptial articles, of the existence of which there is no distinct proof, would be binding on creditors. Such a doctrine would give to every trader a power of excluding his creditors by a recital in a

(*a*) *Lechmere* v. Earl of *Carlisle*, 3 *P. W.* 222.

(*b*) 13 *Eliz.* c. 5. 27 *Eliz.* c. 4. See Lord *Townshend* v. *Windham*, 2 *Ves.* 11.

(*c*) See *Ford* v. *Grey*, 1 *Salk.* 285. Marchioness of *Annandale* v. *Harris*, 2 P. W. 432. *Shelly* v. *Wright*, *Willes*, 11. 12

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deed to which they are not parties. In this instance there appears no motive for the recital if untrue; a recital in a deed executed before the party engaged in trade, when he was not indebted, and twenty years prior to his death. The trustees and executors knowing, as they must, the affairs of the testator, have not suggested that he was indebted at the time of the settlement, nor has any creditor attempted to impeach it. I am bound therefore to declare it valid.

March 7. 16.
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The Princess of WALES *v.* The Earl of LIVERPOOL and Count MUNSTER.

In a bill against executors, the Plaintiff having stated two promisory notes of the same date, one for 15,000*l.* sterling, the other for 15,000*l.* French *louis*, given by the testator for securing a sum of 15,000*l.*, on an affidavit by one of the executors, that he had inspected the first note, and observed on the face of it circumstances tending to impeach its authenticity; that he was informed, and believed, that the second note had been produced by the Plaintiff for payment in a foreign country; and that he was advised and believed that it was necessary in order that his answer might fully meet the case, that he should, before answer, have inspection of the second note, it was ordered, that the Defendants should not be compelled to answer, till a fortnight after production of the second note.

THE bill filed by Her Royal Highness *Caroline Augusta*, Princess of *Wales*, by *Antony Buller St. Leger*, Esq. her next friend, stated, that in or about the month of *August* 1814, *William* Duke of *Brunswick Oels* deceased, for the purpose of securing the sum of 15,000*l.* sterling to the separate use of Her Royal Highness, signed and delivered to her a certain promisory note, or instrument in writing, bearing date the 24th day of *August* 1814, whereby he assured to her the repayment in the year 1816, of the sum of 15,000*l.* sterling, with interest in the mean time; and also, for the same purpose, signed and delivered to her another promisory note, or instrument in writing, bearing date the same 24th day of *August* 1814, whereby he assured to her payment in the month of *August* 1816, of the sum of 15,000*l.* French *louis*, at the rate of 24 French *livres* each, together with interest for the same in the mean time.

The

The bill then stated, that the Duke died in *June* 1815, having made a will, and appointed the Defendants executors, who proved the will, and possessed themselves of his personal estate to an amount more than sufficient to satisfy his debts; and that the principal sums secured by the two notes, together with interest from the 24th of *August* 1814, was due to the Plaintiff for her separate use.

The bill contained the following interrogatories: "Whether, in or about the month of *August* 1814, or when, the said *William* late Duke of *Brunswick Oels*, for the purpose of securing the sum of 15,000*l.* sterling to the separate use of Her said Royal Highness, did not sign and deliver to her two promisory notes of such date respectively, and of such tenor and effect, as hereinbefore in that behalf mentioned, or of any and what other date respectively, or of any and what other tenor and effect respectively? and Whether the said principal sum secured by the said notes or instruments, together with interest on the said sum from the 24th of *August* 1814, is not now wholly due and owing to Her said Royal Highness?"

The bill prayed, that the Defendants might either admit assets of the Duke, sufficient to pay the principal sum of 15,000*l.* and interest, or that an account might be taken of his personal estate, in the usual manner, and that the same might be applied in a due course of administration, and that, if necessary, an account might be taken of what was due upon the said notes, and that the amount thereof might be paid to the Plaintiff for her separate use.

A motion was made by the Defendants, "that the Plaintiff might produce, and leave with her clerk in Court for the usual purposes, a certain promisory note, or instrument in writing, in the bill mentioned to bear date the 24th day of *August* 1814, whereby it is in the bill alleged, that *William* Duke of *Brunswick* deceased assured to the

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Plaintiff payment in the month of *August* 1816, of the sum of 15,000 French *louis* at the rate of 24 French *livres* each, together with interest for the same in the mean time; and that the Defendants might have a fortnight's time to answer the bill, after such instrument should have been so produced."

In support of the motion an affidavit was made by Count *Munster*, that he was advised and believed that an inspection of the note described in the notice of motion might afford to him and the other Defendant, the Earl of *Liverpool*, material information for their defence; and that the note had never been shewn to him, nor, as he was informed and believed, to the Earl of *Liverpool*.

The *Solicitor General* and Sir *Arthur Piggott* in support of the motion.

In an action at law, the Plaintiff could not compel the Defendant to plead, until a copy had been delivered of the written instrument on which the action is founded. When the instrument is under seal, the Plaintiff must make *profert*, and the Defendant may crave *oyer*; and by analogy to those cases, the modern practice, in actions on written instruments, though not under seal, as bills of exchange and policies of insurance, entitles the Defendant to a copy, for the purposes of his defence. It cannot be supposed that a court of equity rejects that equitable principle which is thus adopted by the courts of law. By a cross bill, it is admitted, the Defendants might compel production of the instrument, and compel it for the purpose of defence to the original suit; admitting that, can we consistently deny to the Court a power to order the production, in that suit in which alone the production is required? Inspection of the instruments is in this case necessary to enable the Defendants to make that answer which the Plaintiff seeks. The bill contains interrogatories whether the promisory

notes were not signed by the Duke of *Brunswick*, and whether the sum secured by them is not still due. Supposing a doubt of the authenticity of the instrument, (which I put only hypothetically, but on which so put I am entitled to argue,) of the signature of the Duke for example, is it not obvious, that inspection is necessary to enable the Defendants to answer with correctness and safety? Were the Duke now living, and a Defendant, it might be contended that he could answer from his own knowledge these questions relative to his own acts; but by what means can the Defendants, his executors, no parties to the transaction, without a view of the instrument, answer to its authenticity? The statement in the bill is, that two securities were given for the same sum, payable in different currencies, and at different dates. What assurance has the Court, that while one of these instruments is put in suit here, the other may not be enforced against the Duke's assets in a foreign state?

Sir *Samuel Romilly*, Mr. *Martin*, Mr. *Bell*, and Mr. *Shadwell* against the motion.

If the Defendants are entitled to succeed, the motion must be quite of course; the case of a creditor filing a bill for payment of a sum, due on a security, is one of daily occurrence; yet no precedent has been produced of such an order. The analogy suggested between the practice at law and in this Court is unfounded. It is true, that in an action on a bond the Plaintiff must make *profert*; but it is equally true, that the practice here is different. In a case in which a Plaintiff had stated the substance of a deed in his bill, and referred to it for greater certainty, Your Lordship decided that the Defendant could not compel production on motion, but must proceed by a cross bill. What is there in this case to entitle the Defendants to a course of practice quite new? The difficulty in the way of their answering is altogether imaginary. What difficulty can

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they find, if such is the fact, in stating that they have no knowledge of the transaction, and leaving the Plaintiff to make proof of every part of her case? The statement in the bill, that two securities were given for the same sum, is to the disadvantage of the Plaintiff; before a decree can be obtained, both must be proved and delivered up. The motion is opposed by two decisive objections: according to the uniform practice of the Court, a Defendant cannot obtain discovery except by a cross-bill; and even by a cross-bill discovery can be obtained of those matters only which are material to the defence. In this instance, the Defendants seek by motion, production of an instrument constituting not their defence, but the Plaintiff's title. It is a ground of demurrer to a bill of discovery, that it requires a disclosure of a part of the opponent's case. The evidence of one party may certainly be material to support the case of the other; in a deed for instance, which is the foundation of the title of the Plaintiff at law, the recitals may serve to establish the pedigree of the Defendant, and he may, for that reason, be entitled to the production of that deed; but entitled to it still on the same principle, as constituting a part of his own case. A reference to this principle evinces the necessity of adhering to the rule, that a discovery can be obtained only by filing a bill, which imposes on the party the duty of stating his case, and affords to his antagonist the opportunity of controverting it. Suppose to a bill for a discovery of a deed as containing matter important to the Plaintiff's case, an answer were put in denying that the deed contained such matter, would the Court, in opposition to that answer, on a mere allegation in the bill enforce discovery? If such an attempt can succeed, what will become of pleas of purchase for valuable consideration, to bills for discovery of deeds? In seeking a production of this document, their object is to destroy its effect. The Court will not try the question of their right to inspection on this summary application, but by restricting the Defendants to the ordinary course by bill, will enable the Plaintiff to make a defence.

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It is a circumstance, in my opinion, of considerable importance to the practice, that the bill does not state this note to be in the custody of the Plaintiff. If a cross-bill had been filed, and the answer had not admitted possession of the document, would the Court, on that record, have ordered the production?

Against the motion.

That alone is a decisive objection to the application. But admitting, for the purpose of the argument, that in certain excepted cases, production may be obtained by a Defendant on motion, at least the materiality of the discovery must be distinctly and positively averred. The affidavit on which this application is founded, states only that the deponent has been advised, that from inspection of the instrument something may arise material to the defence. Such an affidavit would not be sufficient to extend the common injunction to stay trial.

The LORD CHANCELLOR.

On a case of so much importance to the practice of the Court, I will not at once give final judgment.

It has been the practice for ages in courts of law, to insist on a *profert* of specialties; but it is within my own recollection, that where an instrument is lost, of which *profert* should otherwise be made, those Courts, adopting a special mode of proceeding, have assumed a jurisdiction which was formerly exercised exclusively by courts of equity. They have done so on the supposition that they were doing what courts of equity did; but I believe it will be difficult to admit, that in the exercise of that jurisdiction, they have acted between the parties as this Court would act. That however is the principle on which they have since proceeded, in compelling, on motion, the production of bills of exchange or promissory notes, the sub-

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jects of an action; and I believe that Lord *Mansfield* first adopted that rule, on the suppostion that he did no more than was constantly done in courts of equity. Speaking with all the deference due to Lord *Mansfield*, it does not appear to me that he exactly recollected what a court of equity would do in such a case; because there is a mighty difference between simply producing an instrument, and producing it in answer to a bill of discovery, where the Defendant has an opportunity of accompanying the production with a statement of every thing which is necessary to protect him from its consequences. On the present case we must refer to the practice of this Court; and admitting that there may be exceptions to the rule of practice, we must also admit that great care must be taken in each particular instance, to ascertain that the case of exception actually exists. It becomes therefore necessary to consider the case, with reference to all our rules for compelling production of instruments, whether instruments mentioned in the bill, or in the answer; recollecting what those rules require the Plaintiff in the one case, and the Defendant in the other, to admit relative to the possession of the instruments. The bill states the existence of a double security for the same sum; we must see what is alleged with regard to the possession of that security in the bill, and (no answer having yet been filed) in the affidavit; observing that from whomsoever the affidavit may proceed, it must, if to be made the foundation of an exception to the rule, contain a statement of the circumstances constituting the case of exception. I will look into my own notes of the practice before I give judgment.

March 10.

On this day the LORD CHANCELLOR, after stating the case, pronounced judgment as follows:

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For the purpose of illustrating what I shall say presently, I observe here that this bill does not represent the notes as in the custody or power of the Plaintiff; and it would be a consideration worthy of attention, regard being had to what is settled by the Court with reference to the production of instruments by Defendants, how far that circumstance is material. It would be contended on the one hand, supposing that the production can be compelled on motion, that if the Plaintiff has not stated that the instruments are in his possession, custody, or power, he does not afford the same case for an order of production, as a Defendant must, against whom the order is never granted, except on the statement that the instruments are in his custody or power; a statement which, according to the modern doctrine, he is not understood to make, when he only refers to the instruments. In *Bettison* v. *Farringdon* (*a*), to a bill for relief, the defence was, that a recovery had been suffered which barred the Plaintiff's right, and the answer referred to a lease and release making a tenant to the *præcipe*, and leading the uses of the recovery; on motion, Lord *Talbot* ordered the production of the deed, merely on the ground of that reference in the answer, assigning as his reason, that as it must be produced at the hearing, it ought to be produced on motion. Subsequent cases appear to question that doctrine on both its points. In Lady *Shaftesbury* v. *Arrowsmith* (*b*), and in *Burton* v. *Neville* (*c*), the Court held that a Plaintiff has a right to call for the instruments creating the estate-tail under which he claims, but expressed great doubt whether he can call for the instrument on which the Defendant frames his title; and later decisions seem to have established that it is not the mere reference that makes the documents part of the answer for the purpose of production (*d*); though by

(*a*) 3 *P. W.* 363. (*b*) 4 *Ves.* 66. (*c*) 2 *Cox.* 242. cited 4 *Ves.* 67.

(*d*) *See Evans* v. *Richardson*, ante, p. 7., and the cases there cited; to which may be added, *Earl of Salisbury* v. *Cecil*, 1 *Cox.* 277. *Smith* v. *Duke of Northumberland*, 1 *Cox.* 363. *Erskine* v. *Bize*, 2 *Cox.* 226. *Campbell* v. *French*, 2 *Cox.* 286.

amending

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If a plaintiff makes a demand on written instruments, without stating that they are in his possession, whether the Court will infer that fact, unless an affidavit is made to the contrary, *quære*.

amending the bill and addressing farther questions, the Plaintiff may, perhaps, compel the Defendant to make those documents part of the answer for that purpose. On the other hand, a question may be made, Whether, on a bill framed like the present, the Court would not assume that the documents on which the Plaintiff comes here to make his demand, are such as he can proffer to the Court? Whether, if a Plaintiff, not stating that certain written instruments are in his custody, yet founds a claim on those instruments, the Court will not infer that he has possession of them, unless an affidavit is made to the contrary? On that point I give no opinion.

The answer now called for is an answer which is to apply itself to the interrogatories with respect to these two notes; and it has been observed that there is a singularity in this case, arising from the circumstance, that though the date of the bills is stated, no mention is made of the period at which they were actually framed: two notes are given, apparently of the same date, for payment of the same sum; and where it is obviously clear, therefore, that if the demand can be substantiated at all against the Defendants, they possess an unquestionable right to have both the securities delivered up, and to call on the Court to take care that while the Plaintiff is enforcing payment against the assets of the Duke of *Brunswick*, justice is done by protecting those assets against all possibility of farther suit in respect of both these documents. The motion is made on a supposition that the instruments can be so dealt with by the Court, and for the purpose of framing an answer to the interrogatories which I have stated.

The general doctrine of the Court, as now settled, I take to be this; that when a bill is filed, it will depend entirely on the manner in which the Defendant expresses himself with respect to any instrument for which the Plaintiff may have a right to call, Whether the Plaintiff can compel

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Reason of the practice requiring proof (beyond mere reference) of possession by the defendant of a document previous to an order for production.

compel from that Defendant production on mere motion? If the Defendant states in his answer that there was such a deed, though the Plaintiff may have an interest in its production, it seems of late settled that that is not enough, but that he must in some way fix the Defendant with possession of the deed. I understand that practice to have proceeded on this consideration, that if an order for production were made, and the Defendant refused to produce the instrument, the Court would find itself unable to apply its process for enforcing obedience, because no *constat* appears on the pleadings that the instrument is in possession of the Defendant, and that he has the power to obey. It is therefore usual to amend the bill, and by introducing an allegation that the instrument is in the possession of the Defendant, to call for such an admission in the answer as will authorize the order. On the other hand it is stated, that if the Defendant wants production of deeds from a Plaintiff who has not said, what by his bill he may say, that he has left the instruments in the hands of his clerk in Court, in order that the Defendant may inspect them, not prayed, as our ancient bills used to pray, that after inspection the Defendant may answer the interrogatories applied to that subject, the general rule of the Court has been this: that the Defendant must file a cross bill in order to obtain discovery of those deeds. In the argument it has been said that courts of common law do, what unless I misunderstand their modern practice, they certainly would do for asking; namely, that where a Plaintiff in the declaration founds his demand on a written instrument, as a promisory note, those courts would give to the Defendant inspection of that instrument, in order that he might see by whom it was written, whether on a stamp, and with the other requisites. I believe that that docrine originated in courts of law, on the notion that there was no reason why they should not do what is done by courts of equity; and the same principle has introduced their modern practice of dispensing with *profert* in cases of lost instruments.

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ments. (a) When I entered *Wesminster-hall* the doctrine was, that where the rules of law required *profert* the party must come into equity. I state it as the opinion of that great man Lord *Hardwicke*, as I have repeatedly seen it in his hand-writing, among his manuscripts, that no such thing could be done at law. (b) Many doctrines have been introduced into courts of law on a supposed analogy to the practice in equity, but without the guards with which equity surrounds the case; as in the instance of dispensing with *profert*, no man can enter this court without guarding his entrance by sanctions which the courts of law cannot impose; and it happens whimsically enough, that there are cases in which courts of law, proceeding on the principle of giving a remedy because one might be obtained in equity, have compelled the party to resort to equity for protection against that practice at law. When courts of law held that because the production of promisory notes might be obtained in equity, they would compel the Plaintiff to produce them, they forgot that in equity, if the promisory note will not, on the face of it, furnish explanation, the Defendant to the cross-bill accompanies the production with an explanation by his answer of all the circumstances: and that the mere compulsory production would deprive him of the safeguards which this practice affords. On the other hand, the party cannot have an answer to a cross bill till he has himself answered the original bill. If there is a necessity, therefore, that he should have production before answer, a necessity founded on special circumstances clearly manifested, the rule of this Court would work injustice unless it admitted relaxation and exception. That such an exception was long ago contemplated, is clear from a

(a) See *Read* v. *Brookman*, 3 *T. R.* 151. *Hendy* v. *Stephenson*, 10 *East*, 55.

(b) See *Whitfield* v. *Faussel*, 1 *Ves.* 387. *Earl of Chesterfield* v. *Jansen*, 1 *Atk.* 345. *Anon.* 2 *Atk.* 61. *Snellgrove* v. *Bailey*, 3 *Atk.* 214. *Walmsley* v. *Child*, 1 *Ves.* 345. *Glynn* v. *The Bank of England*, 2 *Ves.* 41. Lord *Thurlow* appears to have entertained the same opinion, *Atkinson* v. *Leonard*, 3 *Bro. C. C.* 221.

passage

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passage in the original text of the *Practical Register* (*a*), (a book of considerable authority,) in which it is said, "Where a deed in the Plaintiff's hands mentioned in the "Plaintiff's bill was necessary to the Defendant's making "in his defence a full answer, the Court ordered the Plain-"tiff should give him a copy of it;" and it seems to me that if no authority could be produced, the obvious justice of such a position would well authorize the Court to make a precedent upon the subject. There is no general rule with respect to the practice of this Court that will not yield to the demands of justice. In the case of *Beckford* v. *Wildman* (*b*), where something more was sought than that the Defendant should produce and give a copy of the instrument, namely, that the instrument should be kept in the custody of the Court till the hearing, because if not then produced, the justice arising out of variations between that deed and another with which it was to be compared, would be defeated, it was laid down that the general rule would, under circumstances, yield so as to admit an exception; and though in that instance the Court, not thinking that the circumstances required it, refused to go beyond the general practice, it referred to former examples, in which the strict rule had been sacrificed to the justice of a particular case.

. Such is, in my opinion, the general doctrine on this question; but it appears to me, I confess, very clear, that the affidavit on which this motion has been made, falls short of establishing the existence of that necessity which can alone justify a deviation from the practice. It is obvious that it may be material that these instruments should be seen, in order to ascertain whether they have reference to each other as duplicates; whether they contain important variations; whether they are written on stamps; and it must not be forgotten that the Defendants will be entitled to have them

(*a*) P. 161. of Mr *Wyatt's* edition. (*b*) 16 *Ves.* 438.

delivered

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delivered up at the hearing; for I cannot agree that the Court will be content with an indemnity against the consequences of their not being delivered up; at least that proposition is extremely questionable. But the affidavit amounts only to this; (as a negative inference I take it that Count *Munster* must have seen one of these notes; Lord *Liverpool* makes no affidavit, knowing probably less of the matter; but for any thing that I judicially know he may have seen both:) the statement is, that Count *Munster* is advised that an inspection of the instrument may afford to the Defendants material information for their defence; that is, it may, or may not, afford it. How can it be said that this expression "may afford," points out the necessity alluded to in the passage which I have quoted? It appears to me impossible. This motion requires an affidavit stating more strongly the necessity, and in some measure the grounds on which the necessity arises. Unless those grounds are to a certain extent stated, it is impossible to be sure that the Court is not compelling a production which the circumstances do not require. It seems to me that the right mode of disposing of this case is to dismiss the motion, unless the Defendants produce an affidavit of special circumstances.

By a farther affidavit, Count *Munster* stated, that he was informed and believed that, near the end of the year 1816, the Plaintiff sent to one of the executors of the Duke of *Brunswick*, who had not proved the will, two instruments in writing, one in the *German* and the other in the *French* language, both dated 24th *August* 1814, purporting to be engagements on the part of the Duke to pay to the Plaintiff in two years 15,000*l.* sterling, with interest; that upon inspection of those instruments by the deponent in *February* last, the hand-writing, construction, and spelling appeared not equal to those of the late Duke, and the signature

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nature was "*Brunswick* and *D'Oels*," which had not been used by the Duke since his return to his dominions in 1813; that he was informed and believed that in *April* 1817 the Plaintiff caused the instrument stated in the bill for repayment of 15,000 *louis de France*, to be produced for payment in *Brunswick*; and that he was advised and believed, that previous to putting in his answer to the bill, it was necessary, in order that his answer might fully meet the case, that he should have inspection of the last-mentioned instrument.

The LORD CHANCELLOR.

March 17.

I have read the affidavit, and it is enough to say that it lays a sufficient ground for deciding that the Defendants are entitled to a production of the instrument before answer. The Plaintiff is at liberty to come at any time in reply to this affidavit; it being understood that in the mean time, the Defendants shall not be called on to answer till a fortnight after this note has been produced. I take that to be the proper rule of the Court. (*a*)

(*a*) In an anonymous case to be found in 2 *Dick.* 778. Lord *Thurlow* is reported to have said, "Did you ever know an instance of a Defendant's applying against a Plaintiff, even to produce deeds? There cannot be any; it hath been denied. If you want it, you must file a cross-bill for the purpose."

END OF THE FIRST PART.

ORDER OF COURT.

10th *March*, 1818.

It is hereby ordered, that in future all references of answers of Defendants for insufficiency or for scandal and impertinence or for impertinence, made in the same cause, be made to the same Master. And it is farther ordered, that where answers of Defendants have been referred for scandal and impertinence, or for impertinence, and the Court shall afterwards refer the same for insufficiency, the latter reference be made to the same Master as the former reference.

ELDON, C.

ORDER OF COURT.

The 5th day of *August*, 1818.

Whereas it is expedient, that the present practice of the Court, with reference to costs in cases in which notices of motion given are abandoned, should be altered. It is therefore hereby ordered, that from and after the 26th day of *October* next, if a party gives notice of motion and does not move accordingly, he shall, when no affidavit is filed, pay to the other side forty shillings costs upon production of the notice of motion; but when an affidavit is filed by either party, the party giving such notice of motion and not moving, shall pay to the other side costs to be taxed by the Master, unless the Court itself shall direct, upon production of the notice of motion, what sum shall be paid for costs. And let this Order be entered with the Registrar, and fixed up in the offices of the Six Clerks and the Registrar of the Court.

ELDON, C.

REPORTS

OF

CASES

ARGUED & DETERMINED

IN THE

HIGH COURT OF CHANCERY,

Commencing in the Sittings before

HILARY TERM,

58 Geo. 3. 1818.

JOHN DAVIS and MARY BRADFORD his Wife, PLAINTIFFS;

AND

ANN UPHILL, Widow, JOHN UPHILL, BENJAMIN BRADFORD UPHILL, and THOMAS UPHILL, - - - - DEFENDANTS.

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An estate being limited under her marriage settlement to A. for life, with remainder to her children by her deceased husband in such manner as she should appoint, remainder in default of appointment to all the children as tenants in common, an agreement by the children that on her joining in suffering a recovery, the first use to which the recovery should enure should be to A. for life, *without impeachment of waste*, is, it seems, valid in equity; and the Court therefore refused to continue an injunction to restrain her from cutting timber, unless security was given to her for the value of all which she might cut during her life.

THE case as it appeared on the pleadings was as follows:

By settlement made on the marriage of *Thomas Uphill*, deceased, and the Defendant *Ann*, dated the 9th and 10th of *December* 1759, the lands in question in this cause were limited to the use of the husband for life without impeachment of waste, with remainder to Trustees and their heirs to preserve contingent remainders, remainder to the use of the wife for life in part of her jointure, remainder to the use of such child and children of the body of the husband on the body of the wife to be begotten, for such interest and

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estate, and in such manner as the husband and wife should, during their joint lives, by any deed or deeds in writing under their hands and seals duly executed, and attested by two or more credible witnesses, direct or appoint; in default of such appointment to the use of such child or children for such interests and estates, and in such manner, as the survivor should by any deed or deeds in writing, or by will, executed in the presence of and attested by three or more credible witnesses, give, devise, or appoint; and in default of such appointment, to all the children equally as tenants in common.

A settlement of the same date was also made of other lands to the same uses.

The issue of the marriage were, the Plaintiff *Mary Bradford Davis*, *Robert Uphill*, who died leaving the Defendant *Benjamin Bradford Uphill*, his eldest son and heir at law, and the Defendants *Thomas Uphill* and *John Uphill*.

Thomas Uphill the father having died without exercising his power of appointment, by settlement dated the 16th and 17th of *June* 1789, made previous to the marriage of the Plaintiffs, and in contemplation thereof, reciting the indentures of the 9th and 10th of *December* 1759, and the facts before mentioned, it was witnessed, that *Ann Uphill*, the widow, (party to the settlement,) in consideration of the marriage, and by virtue of the power contained in the deed of 1759, granted, released, and appointed to *John Uphill* and *Morgan Davis* and their heirs, certain parts of the estates comprised in that deed, to certain uses therein expressed, in favor of the Plaintiffs and the children of the intended marriage.

Sometime after the marriage of the Plaintiffs it was discovered that the settlement, (so far as regarded the appointment thereby intended to be made by *Ann Uphill*) was defective and void, both as not being attested in conformity with the provisions, and as comprehending objects (the husband

husband and children of the marriage) not within the limits, of the power; whereupon, by Deed-Poll dated the 30th of *May* 1814, duly executed according to the terms of the power, after reciting the defect in the settlement, and that the Defendant *Ann Uphill* had therefore consented to execute the present appointment, conformably to the directions of the deed of *December* 1759, by which the power was created, and thereby not only to confirm the settlement of *June* 1789, so far as she lawfully might, but also to make some farther provision for her daughter the Plaintiff, *Mary Bradford Davis*, and that being in like manner desirous to provide for her two remaining children, the Defendants *John* and *Thomas*, by settling upon them one equal fourth part of the estates over which her power extended so far as she could compute the same, she had by two deeds of appointment of the same date, appointed as to certain parts of the said estates, according to such intention, to the Defendants *John* and *Thomas* respectively in fee; and that she was also desirous to provide for the issue of her deceased son *Robert*, by settling on the Defendant *Benjamin Bradford Uphill* one equal fourth part of the said estates, but, inasmuch as her power did not extend to grandchildren she was unable to make such appointment thereof, and therefore left one equal fourth part unappointed, earnestly recommending her two sons and her daughter to release to the Trustees of the said *Benjamin Bradford Uphill*'s marriage settlement, such equal fourth part; it was witnessed, that *Ann Uphill*, in consideration of natural love and affection for her daughter *Mary Bradford Davis*, and in execution of the said power, thereby appointed that all such parts of the said estates as were therein particularly described should thenceforth go and remain to the only use of the Plaintiff *Mary Bradford Davis*, her heirs and assigns for ever, to the end that she and her husband might convey and assure the same to the Trustees in the settlement of *June* 1789, upon the uses and trusts thereby declared.

The Bill, stating these transactions, and that the Plain-

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tiffs had ever since their marriage been in possession of a part of the premises contained in the last-mentiond deed of appointment, but that the Defendant *Ann Uphill* had continued and still was in possession of the residue thereof, and being instigated thereto by her said sons and grandson the Defendants, *John*, *Benjamin Bradford*, and *Robert*, had, together with them, cut down considerable quantities of timber, and committed various other acts of waste on the last-mentioned part of the said estates, prayed an account of the timber so cut, and the amount of the damage so committed, and an injunction.

The answer, put in by all the Defendants, stated that about the time of the execution of the last-mentioned deed of appointment in favor of the Plaintiffs, it was agreed between all the parties, that the premises of which *Ann Uphill* continued in possession should be limited to her use for her life, without impeachment of waste, and that the Plaintiff *John Davis* and the Defendant *John Uphill* accordingly signed a memorandum in writing, in the following words:— "*June* 25. 1814, We the undersigned do hereby agree to execute a deed declaring the uses of a Recovery by which all *Ann Uphill's* settled estates are to be limited to her for life, without impeachment of waste — part of the estate at *S.* to be assured to *John* — part of the estate at *E. L.* to be assured to *Thomas Uphill* — and the estate at *B.* and part of the estate at *H. S.* and *E.* to be assured to *Mary Bradford Davis*; and to do all other things necessary to give effect to the arrangement made by Messrs. *G.*, the persons appointed to value and divide the estate: and until such arrangement is made and completed, it is declared that certain deeds of appointment dated the 30th day of *May* last shall be considered inoperative and of no effect." The answer farther stated, that in pursuance of such agreement, an indenture of bargain and sale dated the 21st of *June* 1814 was executed between the Plaintiffs and Defendants and other parties, and a Recovery suffered, whereby all the premises comprised in the deed of 1814 (except those of which possession

 had

had been given to the Plaintiffs) were limited to the use of *Ann Uphill* for life, without impeachment of waste, with remainder (as to the part appointed in favor of the Plaintiff *Mary Bradford Davis*) to the use of the said Plaintiff, her heirs and assigns. The answer insisted that under this Indenture and Recovery the Defendant *Ann Uphill* was tenant for life, without impeachment of waste, and therefore that the injunction, which had been obtained upon the statement in the Bill by the suppression of those facts, should be dissolved.

The indenture of the 21st of *June* 1814, executed by the Defendant *Ann Uphill*, *Thomas Uphill*, the Defendant *John Uphill*, the Plaintiffs, the Defendant *Benjamin B. Uphill* and *Ann*, his wife, *John Swarbuck* and *Oliver Kingsward*, recited, among other things, in addition to the deeds stated in the pleadings, articles of agreement of the 12th of February 1810, by which, after reciting that, in contemplation of the intended marriage of the defendant *Benjamin B. Uphill* and *Ann Hayward*, it was proposed and agreed that, as no legal limitation could, under the powers given to *Ann Uphill* by the indenture of *December* 1759, be made by her in favour of her grandson, the said Defendant *Benjamin B. Uphill*, she should release all power of appointment given to her by the said indenture, to the end that certain hereditaments therein particularly described, might, on her death, be divided among all her children by her said late husband, according to the direction of the said indenture, and reciting that, on the treaty for the marriage, it was agreed that *Benjamin B. Uphill* should enter into a covenant for suffering a recovery of that part of the estates in question to which he would be entitled in right of his father on the death of the Defendant *Ann Uphill*, without exercising her power of appointment, and settling the same to the uses expressed in his marriage settlement; *Ann Uphill* covenanted not to execute any appointment of such part of the estates in question, therein described, and released to trustees all her power of appointing the same. The

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indenture of *June* 1814, farther recited, that since the execution of the articles of the 12th of February 1810, *Ann Uphill* having been advised that she could not properly release her power, in regard the same was not releasable in equity, had proposed that on being discharged from all liability to which she might be subject in respect of her covenant to release, she would relinquish all power over the unappointed part of the estates, by joining in the recovery to be suffered thereof; and after a release from the covenantees to *Ann Uphill*, of all the covenants so entered into by her in the articles of *February* 1810; and a release from the Plaintiffs, and the Defendants *John Uphill* and *Thomas Uphill*, to *Benjamin B. Uphill* of the unappointed part of the estates; and a farther recital that for as much as *Ann Uphill* would, by joining in the recovery, forfeit her own life-estate in the premises mentioned in the deed of *December* 1759, it had been agreed that the first use to which the said recovery should enure should be as to all the said premises, to *Ann Uphill* for life, without impeachment of waste; all the lands mentioned in the pleadings were conveyed to a trustee, to the intent that he might become a tenant to the *præcipe*; and it was declared that the recovery should enure as to all the said premises, to the use of the Defendant, *Ann Uphill*, and her assigns, for her life, without impeachment of waste; and after the determination of that estate as to each fourth part of the said premises, to the uses expressed thereof respectively.

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Jan. 22.

An injunction having been granted by the Vice-Chancellor, on this day the Defendants moved to dissolve it.

Sir *Samuel Romilly* and Mr. *Shadwell* for the motion, insisted on the right of the Defendant, *Ann Uphill*, as tenant for life, without impeachment of waste, by virtue of an agreement to which the Plaintiffs were parties.

Mr. *Leach* and Mr. *Wray* in support of the injunction. The agreement on which the Defendants rely is such as a court

court of equity will not support; — a benefit obtained as the condition of an execution of the power, in favor of the party exercising it, and at the expense of its objects.

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If I understand the very complicated deed which has been left with me, the Defendant, *Ann Uphill*, is in law, tenant for life without impeachment of waste, as to the premises with respect to which she is now enjoined from committing waste. The injunction can stand only upon a principle of equity that would disable her from taking a a benefit to herself under the execution of her power, and from so executing it as to convert her estate, which was an estate impeachable of waste, into an estate not impeachable of waste. But this case, which is found upon inspection of the deed much more complicated than it appears in these pleadings, may furnish considerable arguments for contending that it does not fall within the principle adverted to. All the other parts of the family are parties to the deed which changes the quality of her estate for life. The estate had become, by the various instruments recited in the deed, partly appointed, partly not appointed, and partly the subject of appointments the validity of which was questionable; and her powers had been released by instruments, the validity of which was also questionable. If the final arrangement by the deed to lead the uses of the recovery can be considered as an execution of the powers she had, and can be considered in that light only, there seems to me considerable reason for contending that the arrangement might be supported. But it further appears, that the parties found their estates involved in so much uncertainty, partly by reason of the state of the family, and partly by the effect of all the deeds that had been executed, and the difficulty of ascertaining their operation, that they were advised and thought it best to deal with the estates as if they stood limited to the original uses, and to suffer recoveries of their estates tail in remainder, *Ann Uphill*

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joining to enable them to do so; and if the title is to stand upon the recovery she enabled them to suffer, and not upon execution of power, there seems no valid objection in equity to her bargaining as to the terms on which she would join in a recovery; and, indeed, the same observation may apply, if it is to be considered as a mixed transaction of execution of power and recovery, as it seems to me that if her joining in a recovery was required by the family to ascertain their own rights, she might be allowed to judge on what terms she would join. If I do not misunderstand the long deed left with me, and the pleadings, I apprehend she also parted with the possession of some of the premises of which she was tenant for life. I have not met with any case where, in an arrangement settling the interests of all the branches of a family, it has been held, that children may not contract with each other to give to a parent, who had a power to distribute property among them, some advantage which the parent, without their contract with each other, could not have. This, however, is by no means simply the case of execution of a power; but it is a strange mixture of the execution of a power, and of conveyance by record of the estates of both the parent and the children. Upon the whole, I incline to think this injunction should be dissolved; but that, in all events, *Ann Uphill* should not be restrained from cutting timber, unless security is given to her for the full value of all she might cut in her lifetime, to the intent that she may not be a sufferer by an injunction, which, at the hearing of the cause, may not be thought sustainable. (*a*)

In an arrangement settling the interests of all the branches of a family, children may contract with each other to give to a parent who had a power to distribute property among them, some advantage which the parent, without their contract with each other, could not have.

The following order was made: "That the Plaintiffs do, within four months from the date hereof, give security, to

(*a*) For the doctrine of Courts of Equity on the question, whether the execution of a power is avoided by the reservation of a benefit to the party executing, see *M'Queen* v. *Farquhar*, 11 *Ves.* 467. *Aleyn* v. *Bouchier*, 1 *Eden*, 132. *Sugd.* on Powers, App. p. 677. *Palmer* v. *Wheeler*, 2 *Ball* and *Beat.* 18. *Daubeny* v. *Cockburn*, 1 *Mer.* 626., and the cases collected by Mr. *Sugden* on Powers, p. 400., *et seq.*

be

be approved of by Mr. *Cox* one of the Masters of this court, for paying to the Defendant, *Ann Uphill*, and representatives, the full value of the timber (such value to be settled by the Master in case the parties differ about the same) which she might have cut, in case, at the hearing of this cause, it shall appear that she is entitled to cut it; and in default of the Plaintiff's giving such security as aforesaid, the injunction granted in this case be dissolved."

Reg. Lib. A. 1817, fol. 1482.

DANIEL DUNNAGE and ELIZABETH, his Wife, and ELIZABETH DUNNAGE, the Younger, PLAINTIFFS;

AND

THOMAS WHITE, JOHN LETTS, WILLIAM PERKS (Heir and Executor of MARY NELL), ABIGAIL LEWIS, JOHN ATWELL the Elder, and MARGARET his Wife, JOHN ATWELL the Younger, and DAVID ATWELL, DEFENDANTS.

ROLLS. *Feb.* 3. 20. 23. 25.

A deed executed by the members of a family to determine their interests under the will and partial intestacy of an ancestor, not enforced, it appearing on the face of the deed that the parties did not understand their rights, or the nature of the transaction, and that the heir surrendered an unimpeachable title without consideration, and evidence being given of his gross ignorance, habitual intoxication, liability to imposition, and want of professional advice; in the absence of direct proof of fraud or undue influence, and after an acquiescence of five years.

BY his will, dated the 8th of March 1802, *David Lewis*, after giving to his nephew, *William Lewis*, in fee, a freehold estate at *Bourne End*, devised to the Defendants, *White* and *Letts*, and their heirs, a freehold estate in *Bearbinder Lane*, upon trust, to receive the rents and pay them to *Jane Hill* during her life; and, after her decease, to sell the estate and divide the purchase-money in manner following; three sixth parts to be paid to his nephews, *William Lewis*, *John Lewis*, and *William Perks*, and one sixth part

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to his niece, *Mary Nell*; the other two sixth parts to be invested in the public funds, for the benefit of his nieces, the Plaintiff *Elizabeth Dunnage* the elder, and the defendant, *Margaret Atwell*, — the interest or dividends to be paid to them equally, during their lives, for their separate use; and after the decease of either of them who should leave any child or children, to be applied towards the maintenance of such child or children during their minorities; and upon all and every of them attaining the age of 21 years, the said stock to be transferred to them, or the survivors or survivor of them, in equal proportions. The testator then, after giving some legacies, devised and bequeathed the residue of his estate and effects to the trustees and executors thereinafter named, upon trust, to sell and dispose of his household goods and stock in trade, and collect all debts due to him, and all monies belonging to him upon mortgage, &c. and to divide the same into six equal parts, and pay them in manner following; four equal sixth parts to his said nephews, *William Lewis*, *John Lewis*, and the Defendant *Perks*, and his niece *Mary Nell*. The remaining two sixth parts to be invested in the public funds upon the same trusts, in favor of the Plaintiff *Elizabeth Dunnage* the elder, and the Defendant *Margaret Atwell*, during their lives, and, after their decease, of their children, as were before declared concerning two sixth parts of the money to arise from the sale of the freehold estate in *Bearbinder Lane*. The testator appointed *White* and *Letts* his executors.

In addition to the freehold estates mentioned in the will, the testator at the time of its execution, was in possession of some freehold and copyhold lands at *Munden Dane End*, of which he had paid the purchase money, but no conveyance had been made; and between the date of his will and his death, he purchased other freehold lands at *Munden Dane End*, and obtained a decree of foreclosure of some messuages in *Spital Fields*, which had been mortgaged to him in fee.

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The testator died 2d *February* 1809, unmarried, and without issue. His next of kin were his nephews and nieces, *James Edward Lewis*, *William Lewis*, if living, the Plaintiff *Elizabeth Dunnage*, *Mary Nell*, and the Defendants *William Perks*, and *Margaret Atwell*. He had only one brother, *John Lewis*, who died in his lifetime leaving two sons, *William Lewis* the eldest, and *James Edward Lewis*. In *May* 1796, *William Lewis*, then unmarried, entered as a seaman into the navy, and in *August* following deserted from his ship on the *Jamaica* station, and had not since been heard of. (*a*) If he died without issue before the testator, his brother *James Edward Lewis* was the heir at law of the testator at the time of his death; and if, having survived the testator, he afterwards died without issue, *James Edward Lewis* thereupon became, as his heir at law, the heir at law of the testator. *James Edward Lewis*, and his mother *Ann Lewis*, were the only next of kin of *William Lewis*, in the event of his death unmarried and without issue.

At the time of making his will the testator had not any nephew named *John Lewis*, (his only nephew of that name having died an infant upwards of 20 years ago,) and it was alleged by the bill, and admitted by the answers of all the Defendants, that the name *John Lewis* was inserted in his will by mistake for the name *James Edward Lewis*.

White and *Letts* proved the will, and entered into the receipt of the rents of the testator's real estate, except the estate at *Bourne End*, of which possession was taken by *James Edward Lewis*.

By indenture dated 26th *February* 1810, made between the Plaintiffs *Daniel Dunnage* and *Elizabeth* his wife, of

(*a*) The bill alleged that he was supposed to have perished on board a vessel lost at sea.

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the first part; the Defendants *John Atwell* and *Margaret* his wife, of the second part; *Mary Nell*, of the third part; the Defendant *William Perks*, of the fourth part; and *James Edward Lewis*, (described as the brother and heir at law, and also one of the next of kin of *William Lewis*, then supposed to be dead,) of the fifth part; reciting the will of *David Lewis*, and his subsequent purchase of the estate at *Munden Dane End*, and in consequence of his not afterwards republishing his will, the descent of those lands to his heir; and farther reciting that *John Lewis* died in the life of the testator, and that *William Lewis*, upwards of fifteen years ago, departed the kingdom, and was supposed to have been lost on board a vessel which foundered at sea, and that *James Edward Lewis* was his heir at law, and *James Edward Lewis*, *Elizabeth Dunnage*, *Margaret Atwell*, *Mary Nell*, and *William Perks*, were his only next of kin, and that in order to prevent disputes and litigations between the several parties thereto, respecting their shares and interests in the said testator's real and personal estates so by him given and devised, and also in the said testator's real estates so descended to his heir at law, it had been agreed that the whole of the testator's property should thenceforth, or when the same or any part thereof should become payable or distributable, be taken and held by the parties thereto, and by every person interested therein, in trust for them, or any of them, in such shares, and upon the trusts, &c. after mentioned concerning the same, and that the parties had accordingly agreed to enter into the covenants thereinafter mentioned; it was witnessed, that in pursuance of the recited agreement, *Daniel Dunnage* for himself and his wife, *John Atwell* for himself and his wife, *Mary Nell*, *William Perks*, and *James Edward Lewis*, severally covenanted with the others, their heirs, executors, &c. that each of them respectively, their respective heirs, &c. and all persons interested in the premises as trustees or otherwise for the parties thereto, or any of them, should thenceforth and so soon as the same or any part thereof should become vested in,

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or payable or distributable to or among, the parties thereto or any of them, or any or either of their heirs, &c. stand seised or possessed of all and singular the real and personal estate and property, by the said testator in his said will so given, devised, and bequeathed, and also of the pieces or parcels of land and hereditaments, which had so descended to the testator's heir at law, and the monies, rents, issues, dividends, and profits, arising and to arise therefrom, (subject to the interest of *Jane Hill* and her assigns, in the premises in *Bearbinder Lane*, for her life, under the will), for the uses, &c. after mentioned, (that is to say,) as to the premises at *Bourne End*, to the use of *James Edward Lewis* in fee; and as to one undivided fifth part of all other the testator's real and personal estates, thereinbefore respectively mentioned, as well those which passed by his will, as those which descended to his heir at law, to the use of, or in trust for, *James Edward Lewis*, his heirs, executors, administrators, and assigns, according to the respective natures and kinds thereof; and as to one other undivided fifth part, to the use of, and in trust for, *Daniel Dunnage* and *Elizabeth* his wife, their heirs, executors, &c. (*ut supra*), and as to one other undivided fifth part, to the use of, and in trust for, *John Atwell* and *Margaret* his wife, their heirs, executors, &c. and as to one other undivided fifth part, to the use of, or in trust for, *Mary Nell*, her heirs, executors, &c. and as to the remaining undivided fifth part, to the use of, and in trust for, *William Perks*, his heirs, executors, &c.

James Edward Lewis died in *July* 1815, having by his will, dated 29th *March* 1815, given all his estate and effects to his wife, the Defendant, *Abigail Lewis*, her heirs and assigns for ever, and appointed her sole executrix.

The bill prayed, that the will of *David Lewis* might be established and the trusts performed, that an account might be taken of his personal estate, and of the rents and profits of his real estate devised or descended; that the trusts of the

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the indenture of 26th *February* 1810 might be carried into effect, and the rights of the Plaintiffs and Defendants in his real and personal estates ascertained and declared; that such parts of his personal estate as remained unsold might be sold, and that the monies to arise by such sale, together with such parts of his personal estate as remained in the hands of the executors undisposed of, might be divided among the Plaintiffs and the other persons parties to the indenture of 26th *February* 1810, or their representatives, in the manner and proportions therein mentioned, and that his real estates might be conveyed to the Plaintiffs and the other persons parties to the said indenture, or to the heirs of such of them as were since deceased, in such manner and proportions as therein mentioned, or otherwise that the testator's real and personal estates might be conveyed and paid to, or secured for the benefit of, the Plaintiffs and such other persons as should appear to be entitled thereto, in such shares, and in such manner, as the Court should direct.

Abigail Lewis by her answer stated, that *James Edward Lewis* was a very ignorant man, and very much addicted to liquor, and that he was prevailed upon to execute the indenture of 26th *February* 1810 by fraud and imposition, and was not when he executed the same, acquainted with his rights as a devisee and legatee under the will, and as the heir at law, of the testator, and of *William Lewis*, but was induced to believe that *Dunnage* and his wife, and *Atwell* and his wife, had absolute interests in the shares of the testator's residuary personal estate, and of the money to arise by the sale of the estate in *Bearbinder Lane*, and could dispose thereof, and that he executed the indenture under such belief; that he did not receive any consideration whatever for executing the indenture, and that he was not at any time during his life called upon by the Plaintiffs to carry it into effect; and she submitted that the indenture ought

ought not to be carried into execution, and that *James Edward Lewis* was not bound thereby.

Several witnesses deposed that *James Edward Lewis* was in a low station of life, having been employed by different victuallers to carry out beer for their customers, and continuing in that employment to the year 1810; that he was very ignorant and illiterate, addicted to drinking to excess, and in the habit of almost daily intoxication; that he did not understand the nature of deeds and legal instruments, and was incompetent to judge of his legal rights without professional assistance; and that he might be easily imposed on and influenced in matters of business.

The Solicitor who attested the indenture of 26th *February* 1810, deposed that the Plaintiff *Dunnage* had been his client on various occasions, during six years previous to that date, but that *James Edward Lewis* became known to him about the end of the year 1809, and had never been his client; that *James Edward Lewis* and *Dunnage* gave verbal instructions for preparing the deed; that previous to the execution, the draft, and afterwards the deed ingrossed, were read to *James Edward Lewis*, and the contents fully and truly explained to him; that he was fully acquainted with, and comprehended, the true extent and nature of his rights and interests as a devisee and legatee, under the will of *David Lewis*, and as the heir at law of *David Lewis* and of *William Lewis*, and the contents and operation of the deed; that he executed it of his own free will, and without any undue or other influence; that he was perfectly sober at the time, and afterwards expressed himself satisfied with it; but that it was not perused by him, or by any professional person, other than the deponent, on his behalf.

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Girdlestone*, for the Plaintiffs, Mr. *G. Wilson* and Mr. *Shadwell* for Defendants in the same interest.

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The object of the suit is to establish the will of *David Lewis*, and the execution of the trusts of the deed of *February* 1810, is prayed as the prescribed mode of executing the trusts of the will. The validity of that deed is the real subject in dispute.

The deed proceeds on the basis of a compromise of doubtful rights. On the face of the will *James Edward Lewis* takes nothing; the fact that the testator intended to describe him by the name *John Lewis* was uncertain; the death of *William Lewis*, (the heir at law of the testator,) much more his death without issue and without a will, (in which events only *James Edward Lewis* would succeed to his rights as the heir at law of the testator,) was uncertain; the rights of *James Edward Lewis*, therefore, whether as devisee and legatee, or as heir at law, were uncertain. The deed removes this uncertainty, and recognizes and establishes rights previously doubtful. That recognition is a valuable consideration, *Stapilton* v. *Stapilton* (*a*), *Cann* v. *Cann.* (*b*)

The second foundation on which this deed rests, is family arrangement. A compromise by which the peace of families is secured, the court will anxiously support, abstaining from a rigorous scrutiny into the terms of the bargain, and sanctioning its stipulations, though proceeding on suppositions of right not conformable to the fact. In a state of common ignorance and uncertainty, the interests of the parties are promoted by any arrangement which terminates doubt and dispute. *Stapilton* v. *Stapilton*. *Cann* v. *Cann*.

(*a*) 1 *Atk.* 2.

(*b*) 1 *P. W.* 723. *Roe* v. *Mitton* was also referred to, 2 *Wils.* 356. and see *Taylour* v. *Rochford*, 2 *Ves.* 284.

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The deed therefore is not in the view of a court of equity merely voluntary; but if it were, it would not be less valid. The distinction is between an agreement, and a declaration of trust. It is now conclusively established that this Court, though it will not compel the performance of voluntary agreements, *Colman* v. *Sarrel* (*a*), executes voluntary declarations of trust, *Ellison* v. *Ellison.* (*b*) It will not interfere to give perfection to the instrument; but the trust being created, and the relation of trustee and *cestui que trust* constituted, the parties are bound, *Sloane* v. *Cadogan.* (*c*) This indenture is an equitable division of trust property. If an estate is vested in trustees, a deed executed by the *cestuis que trust*, covenanting that a certain number of acres shall be the property of each, is in equity as effectual a partition as a conveyance.

A farther peculiarity of this case is, that the Court must act; the parties cannot be left to law; the property must be distributed; and the only question is, what rule of distribution the Court will adopt. In these circumstances the deed must prevail, unless the representative of *James Edward Lewis* succeeds in impeaching it on the ground of incompetence and fraud. The suggestion of fraud is totally destitute of evidence, and is disproved by the acquiescence of *James Edward Lewis*, without complaint, during the five years which he lived after the execution of the deed. The evidence of incompetence is merely general. A person in a low station in life, illiterate, addicted to intoxication, is not under an absolute incapacity of executing a legal instrument. In order to impeach the deed, the Defendant must at least connect these general incapacitating habits with the execution; not to insist on the decisions that even intoxication at the time is not a sufficient objection unless caused by the practice of the other party. (*d*)

(*a*) 3 *Bro. C. C.* 12. 1 *Ves. Jun.* 50. (*b*) 6 *Ves.* 656.

(*c*) *Sugd.* Law of Vendors, App. p. 49. and see *Pulvertoft* v. *Pulvertoft*, 18 *Ves.* 99. *Ex parte Pye.* 18 *Ves.* 149.

(*d*) *Johnson* v. *Medlicott*, 3 *P. W.* 131. n. A. and see *Cooke* v *Clayworth*, 18 *Ves.* 12.

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She must prove actual influence: the proof extends only to liability to influence; and on the other side is the satisfactory deposition of the person who attests the deed. The Defendant proves that imposition might have succeeded: her case requires evidence that it was practised.

Mr. *Hart*, and Mr. *Parker*, for the Defendant *Abigail Lewis*.

The deed cannot be supported in a court of equity. In order to demonstrate that *James Edward Lewis* executed it in ignorance, or under influence, no more will be required than to confront its provisions with an accurate statement of his interest in the property of the testator. The estate at *Bourne End* devised to *William Lewis*, and the estates purchased after the date of the will, devolved to him in all events, as the heir of the testator, if *William Lewis* died in the testator's life, or as the heir of *William Lewis* if he survived the testator. His interest in the money to arise from the sale of the estate in *Bearbinder* lane, and in the residuary estate, stood thus: As a legatee described by the name of *John Lewis*, he took one-sixth of each of those funds. If *William Lewis* died in the life of the testator, he took, as one of the testator's next of kin, one-fifth of so much of the sixth bequeathed to *William Lewis* as was personal estate, and as heir of the testator, the whole of what was real estate; and if *William Lewis* survived the testator, he took, as one of his next of kin, a moiety of so much of that sixth as was personal estate, and as his heir, the whole of what was real estate. If the legacy to *John Lewis*, instead of taking effect in favor of *James Edward Lewis*, was void or lapsed, *James Edward Lewis* was entitled, if *William Lewis* survived the testator, as one of the testator's next of kin, to one-sixth of so much of that sixth as was personal estate, and as one of the next of kin of *William Lewis*, to a moiety of another sixth of such portion of that sixth; and if *William Lewis* died in the testator's life, *James Ed-*

ward

ward Lewis was entitled, as one of the next of kin of the testator, to a fifth of so much of that sixth as was personalty; and in either event, as heir of the testator or of *William Lewis*, to the whole of so much of that sixth as was realty.

It is clear therefore that by this deed *James Edward Lewis* could acquire nothing. As to the real estate, against the claim of a nearer heir or devisee of *William Lewis*, (if he left children or a will,) it afforded no protection; and against all other persons the right of *James Edward Lewis* was unimpeachable. Every court would, under the circumstances, presume the death of *William Lewis*; and *James Edward Lewis*, having the legal estate as heir of him or of the testator, must have recovered in an ejectment. In the most unfavorable event, (the death of *William Lewis* in the life of the testator,) he was entitled to the whole of the *Bourne End* estate and the descended estates, and to one-fifth of the residuary personal estate; and yet it is argued that he is benefited by a deed which giving to him the *Bourne End* estate, then consolidates the personal and the real estates, and restricts his right to one-fifth of the whole. He surrendered valuable interests in property, to which the other parties to the deed had no claim, and received in exchange a share of that property which alone could become the subject of litigation, precisely the least that could by possibility be due to him. It is incredible that he could execute such an instrument with a knowledge of his rights, and of its operation; and the solicitor whose testimony is so positive, if he was not equally ignorant, betrayed his client.

The whole deed is founded in error and misrepresentation. (*a*) *Dunnage* and *Atwell* assume an absolute interest in right of their wives, in property limited to their children;

(*a*) See *Broderick* v. *Broderick*, 1 *P. W.* 239.

and

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and the recital represents *James Edward Lewis* as one of five, instead of one of two, next of kin of *William Lewis.*

An instrument so framed contains intrinsic evidence of mistake or fraud; and it becomes needless to insist on the proofs of general incapacity, or on the preliminary objection, that the deed containing nothing executory, is such as, admitting its validity, this Court cannot enforce.

Mr. *Phillimore* for the executors.

Feb. 25.

The MASTER *of the* ROLLS.

In this case the first question is, whether the Plaintiffs are entitled to have the deed of 26th *February* 1810 carried into execution. The objections are, first, that the deed was voluntary, containing no consideration in favor of the principal party; next that it was obtained by fraud, from a person in a state of imbecility.

When the testator died in *February* 1809, his nephew *William Lewis*, the eldest son of his brother *John Lewis*, had been long unheard of. In 1796 he left *England* as a sailor, and no intelligence having been since received of him, except two letters written recently after his departure, the family considered him dead. On the supposition of his death, whether he died before or after the testator, the real estate given to him descended to *James Edward Lewis*. But the distribution of the share bequeathed to *William Lewis* of the produce of the estate in *Bearbinder* lane, and of the residuary estate, supposing him dead, varied with the time of his death. If he died in the testator's life, the next of kin of the testator would be entitled, and his own next of kin if he died after the testator's decease. It seems agreed on all sides that the name *John Lewis* was inserted in the will by mistake, and that the testator meant to denote *James Edward Lewis*, the son of one *John Lewis*,

and

and the brother of another, both deceased. Supposing that fact ascertained, the only doubt was at what period *William Lewis* died. Recollecting that the testator lived till 1809, and that *William Lewis* had not been heard of since 1796, having left the country under circumstances which gave an early date to his probable death, there seems little doubt that he died before the testator. At the testator's death *Jane Hill*, the devisee for life, was living, and she enjoyed during her life, the rents of the estate in *Bearbinder* lane. Beside the estates devised, the testator had subsequently acquired real property, which could not pass by the will. On those estates the devisees in trust entered. *James Edward Lewis*, the undoubted heir at law of the testator, and of *William Lewis*, took possession of the *Bourne End* estate.

Such were the circumstances of the family at the time of the execution of the deed: some doubt existed on one point, namely, the precise period of *William Lewis's* death. The fact of his death could scarcely be considered doubtful: and the strong probability was, that he died in the life of the testator. On that supposition the real estates descended to *James Edward Lewis* the heir of the testator; if *William Lewis* died after the testator, (unless he left children, or a will, of which there is no evidence,) they descended to *James Edward Lewis* as his heir; but to no other person except *James Edward Lewis*, did any benefit pass in either event. With respect to the personal estate, the time of the death was certainly material; whether the next of kin of the testator, or of *William Lewis* were entitled, depends on the fact of survivorship. It is a strange mistake in the deed to represent the parties to it as the next of kin of *William Lewis*, when it is clear that his sole next of kin were his mother and *James Edward Lewis*; and it must not be forgotten that that error is one of the *data* on which the transaction is founded. Under these circumstances the deed is executed. Of the incompetence of *James Edward*

 Lewis

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Lewis there is no satisfactory evidence: the Solicitor who attests the deed, proves that he was sober, and under no mental disability; and with regard to undue influence, the evidence is certainly not sufficient to impeach the deed: but as to his general description there is strong testimony, and all on one side; that he was dissolute, illiterate, addicted to intoxication; that he had recently passed from a low station into the possession of property to which he was not apparently destined; and that his course of life rendered him extremely subject to imposition. Such habits, though not constituting absolute incapacity, lay a ground for a strict examination, whether the instrument contains in itself evidence that advantage was taken of them.

The Solicitor who drew the deed, says that he received the instructions from *Dunnage* and *James Edward Lewis*, but he has not said what those instructions were: he admits that he had been for six years the solicitor of *Dunnage*, that he had scarcely any previous knowledge of *James Edward Lewis*; and that no other professional person was employed on his behalf. In these circumstances *James Edward Lewis* executes this instrument. Is its nature such as to import that all the parties, and he among the rest, were cognizant of what they did, and understood their rights? There seems strong ground to believe that the Solicitor who says he fully explained the deed, did not understand the rights of the parties. I will not suppose that he intentionally misrepresented them, but they are grossly mis-stated in the deed. First, as I have remarked, it mis-states the persons next of kin to *William Lewis*; next after a recital, in general faithful, of the will, and in particular a recital that the shares of *Elizabeth Dunnage* and *Margaret Atwell* were, after their deaths, to be held in trust for their children, it proceeds to make an absolute disposition of those shares, depriving the children of every right under the will; and then, having limited to *James Edward Lewis* the *Bourne End* estate specifically devised, it directs the division

division of the remainder of the real estate into five parts, of which one only is to be his. Four-fifths of the real estates descended on him are thus surrendered to parties who never had a pretence of title to any portion of them. No doubt was suggested of the legitimacy of *James Edward Lewis*, or of his being heir of the testator, and *William Lewis*; yet this large proportion of the property is thus relinquished without an equivalent. The deed ought to have contained a description of the whole real estate of the testator. How does it appear that *James Edward Lewis* knew to what estates he was entitled? This deed specifies only a part. It is too plain that those by whom he was surrounded kept him in ignorance of the extent of the property which had devolved on him.

As to the personal estate, if the deed was designed to solve doubts and terminate disputes, it should have been executed by persons competent to protect *James Edward Lewis*: the covenant of these parties affords no protection against the claims of children or devisees of *William Lewis*. *James Edward Lewis* taking one-sixth under the description of *John Lewis*, and in the event of the death of *William Lewis* in the testator's life, taking, as one of the next of kin, one-fifth of his one-sixth, would in this least favorable event be entitled to precisely that share of the personalty which was limited to him by the deed, namely, one-fifth of the whole. His interest in the personalty, and the realty to be converted into personalty, could not be less than one-fifth. From the deed, therefore, he could gain nothing in any possible event; but by a sweeping clause he abandons, without equivalent, a probable share of the personalty, and an undisputed real estate.

It is then insisted that the deed may be supported as a family-arrangement, according to the doctrine of *Stapilton* v. *Stapilton* and *Cann* v. *Cann*. Undoubtedly parties entitled in different events may, while the uncertainty exists, each

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taking his chance, effect a valid compromise. In *Stapilton* v. *Stapilton* the legitimacy of the eldest son was doubtful; that was a question proper to be so settled; and the settlement was a consideration which gave effect to the deed; but without inquiring whether this transaction was voluntary, (for it is beyond doubt that *James Edward Lewis* received no consideration,) is this a deed which the Court ought to execute? I am satisfied that *James Edward Lewis* never understood it. By this instrument he covenants that two-sixths of the personalty shall belong to *Dunnage* and *Atwell* and their wives; but under the will, their children had fixed interests in the event of survivorship. What power had the parents to dispose of the property in their own favor? It is true they are now willing to correct this error, but the instrument must be considered as it stood at the date; and the question is, was it then a right disposition of the property? Instead of ending litigation, this deed creates it: as soon as the children became of age they must be advised to assert the rights of which it sought to deprive them. It is clear that the parties knew not what they were doing.

Considering, therefore, the state of mind of this person, his circumstances, and the nature of the transaction, I am of opinion that this is not such a deed as the Court ought to execute.

Upon the remaining question, whether the suit can be sustained for other purposes, I think that there is sufficient to entitle the parties to an account of the real and personal estate of the testator, to be administered on the trusts of his will, as if the deed of 1810 had never been executed. Were I now absolutely to dismiss this bill, it would be necessary to file another, with the omission of the deed, in every respect similar.

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The bill, so far as it prays an execution of the deed of *February* 1810, must be dismissed with costs. (*a*)

The decree ordered that so much of the bill as sought that the trusts of the indenture of the 26th of *February* 1810 might be carried into effect should be dismissed, and as against *Abigail Lewis* with costs; and declaring that *William Lewis*, the eldest son of *John Lewis*, the brother of the testator, died in the life-time of the testator, established the will, and directed the usual accounts. Reg. Lib. A. 1817, fol. 906.

(*a*) The validity of deeds of compromise between members of the same family, has been the subject of dispute in many cases. In *Frank* v. *Frank*, 1 *Ch. Ca.* 84. *Cann* v. *Cann*, 1 *P. W.* 723. *Stapilton* v. *Stapilton*, 1 *Atk.* 2. *Pullen* v. *Ready*, 2 *Atk.* 587. *Cory* v. *Cory*, 1 *Ves.* 19. *Stephens* v. *Bateman*, 1 *Bro. C. C.* 22. *Kinchant* v. *Kinchant*, 1 *Bro. C. C.* 369. *Stockley* v. *Stockley*, 1 *Ves. & Beam.* 23., the agreement was enforced; and see *Wycherley* v. *Wycherley*, 2 *Eden*, 175. *Gibbons* v. *Caunt*, 4 *Ves.* 849. In *Turner* v. *Turner*, 2 *Ch. Rep.* 81. *Cocking* v. *Pratt*, 1 *Ves.* 400. *Lansdown* v. *Lansdown*, *Mos.* 364. *Leonard* v. *Leonard*, 2 *Ball & Beat.* 171., the agreement was rescinded; and see *Gee* v. *Spencer*, 1 *Vern.* 32. *Pusey* v. *Desbouverie*, 3 *P. W.* 315. *Evans* v. *Llewellyn*, 2 *Bro. C. C.* 150. *Bowles* v. *Stewart*, 1 *Schoal. & Lefr.* 209.

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TURNER v. TURNER.

Jan. 16.
July 8.

TURNER v. METCALF.

It is not competent to the Lord Chancellor to order the Master to review a report confirmed and followed by a decree of the Master of the Rolls, containing consequential directions, while that decree stands.

THE bill in the original cause having been filed in Trinity term 1799, by persons interested under the will of *Joshua Turner* deceased, praying an account of his personal, and if necessary a sale of his real, estates, on the 12th of *November* 1801 a decree for an account was pronounced. On the 20th of *December* 1815 the master made his report, and on the 15th of *May* 1816, the order of the 23d of *March* preceding for confirming the report *nisi* was made absolute. On the 27th of *November* following the cause was heard for farther directions by the Master of the Rolls.

The Plaintiffs now moved that the Master might be directed to review his report, and the Plaintiffs be at liberty to take objections thereto, and that the proceedings under the decree made upon the hearing for farther directions, and all other proceedings, be in the mean time stayed.

The affidavits in support of the motion stated, that the solicitor originally employed by the Plaintiffs having been guilty of great neglect, was in *April* 1813 removed; that the succeeding solicitor during the preparation of the report made various objections to it in the Master's office, the result of which he never communicated to the Plaintiffs, and in *September* 1816 went to *America*, leaving the papers in these causes in the possession of a person, who by an order of the 3d of *May* 1817 was directed to deliver them to the present solicitor of the Plaintiffs on taxation and payment of the costs due; that though they had proceeded under that order with all possible diligence, the Plaintiffs had not yet obtained possession of the papers, from the

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want of which their solicitor was unable to take the proper measures for their protection; that the Plaintiffs residing upwards of 200 miles from *London* had entrusted the management of the cause to their solicitors; and that there were many important exceptions (four of which were specified), to be taken to the Master's report, by which, if it remained confirmed, the interests of the Plaintiffs would be totally lost

Sir *Samuel Romilly*, Mr. *Wetherell*, and Mr. *Harrison*, for the motion.

The injury in this case has arisen not from the neglect of the solicitor, but from his absence. Can the Plaintiffs be bound by a decree in a suit in which they were not represented by a solicitor?

Mr. *Hart* and Mr. *Shadwell* against the motion.

The question is, whether the Defendants, who have proceeded regularly, are to suffer for the misconduct of two successive solicitors of the Plaintiffs, by the farther delay of a suit which has already depended 16 years? The remedy of the Plaintiffs is against their solicitor. It is not suggested that the exceptions proposed are different from those which were overruled by the Master.

The LORD CHANCELLOR desired to be informed of the proceedings in the Master's office, and the nature of the exceptions.

July 8.

The LORD CHANCELLOR.

There is a difficulty in this case which I cannot overcome. The Master having made a report on the original decree, stating debts, &c. the whole of which the Plaintiffs say is wrong, especially in respect of certain allowances, the late Master of the Rolls pronounced a decree directing all things to be done conformably to that report previously confirmed;

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In a cause which has been much delayed, the Court will not, at the expense of farther delay, relieve the Plaintiff from the consequences of the gross neglect of his solicitor.

confirmed; how can I displace the decree on a motion for reviewing the report? In this case there certainly has been gross and shameful negligence; but after the past delay, I cannot detain suitors here because a Plaintiff chuses to employ solicitors who will not perform their duty; nor do I conceive that it is in the power of the Lord Chancellor to order a report to be reviewed, after having been confirmed and followed by a decree of the Master of the Rolls, while that decree stands. (*a*)

Motion refused.

(*a*) The general competence of the Court to direct the review of a report after confirmation seems necessarily implied in this proposition. Few reported decisions, however, occur in which that course has been pursued. The *Practical Register* states the doctrine thus: "After a report is confirmed, the Court will not easily (if at all) stir it upon pretence of an omission or mistake; for the parties had sufficient time to except to it; and if they will not mind their business it is their own fault." (Ed. *Wyatt*, p. 380.) In *Turner* v. *Turner* (1 *Dick.* 313.), "The cause came on to be heard for farther directions on the report, which was confirmed. Sir *Thomas Clarke*, M. R. not being satisfied, referred it back to the Master, to review his report, and to be more particular." On reference to the Registrar's book, it appears that in this cause (which was between *Robert Turner*, plaintiff, and *John Turner*, *James Clare*, and others, defendants), the report had been confirmed absolutely (*Reg. Lib.* B. 1757, fol. 138.) in the usual course, after the order *nisi.* (*Reg. Lib.* B. 1757, fol. 42.) The following entry appears of the hearing for farther directions: "20 *April* 1758. This cause having received a hearing on the 26th day of *February* 1754, before the Right Honourable the Master of the Rolls, &c., it was among other things ordered, that it should be referred to Mr. *Edwards*, one of the Masters of this Court, to inquire what incumbrances there were on the estate of the testators *Thomas* and *Henry Turner*, the grandfather and father in the pleadings mentioned, or any part thereof, and by whom and when they were made; and state the same to the Court: that the said Master, on the 19th of *December* last, made his report,

 and

and thereby certified that he had proceeded to enquire what incumbrances there were on the estate of the said testators, *Thomas* and *Henry Turner*, the grandfather and father, or any part thereof, and by whom and when they were made, and found that the several incumbrances following, made by the several persons at the respective times, and in the respective manners particularly mentioned in his report, were incumbrances on the estate of the said testators, *Thomas* and *Henry Turner*, the grandfather and father of the said plaintiffs; that is to say, by indentures of lease and release, bearing date the 26th and 27th *May* 1730; also, by indenture bearing date the 11th *November* 1730; also, by indenture dated the 17th day of *February* 1740; also, by indenture dated the 1st day of *July* 1741; and also by indenture quadripartite, dated the 26th day of *May* 1742: and this cause coming this present day to be heard before His Honor for farther directions, on the said Master's report, and as to the matter of costs reserved by the said decree, in the presence, &c., His Honor doth order that it be referred back to the said Master to review his report, and that he do distinguish the particular interest of the several parties in the estates in question, and the respective values of those estates in which they are so interested." *Reg. Lib.* B. 1757, fol. 289.

The Master ordered to review his report after confirmation.

A subsequent case before the same judge, is thus stated by the same reporter. "*Allen* v. *Allen*. Report pursuant to a decree. No objection was taken to the draught, and the report was confirmed. The cause came on this day to be heard for farther directions on the report. After hearing the decree and report read, Sir *Thomas Clarke*, M. R. ordered the cause to stand over, with liberty for the plaintiff to take exceptions to the report, as if he had taken exceptions to the draught." (1 *Dick.* 362.) From the Registrar's book it appears, that in this cause, (which was between *William Allen*, plaintiff, and *Jane Allen* and *Roderick Mackenzie*, and others, defendants,) the report was confirmed with the consent of some of the defendants: and, after the usual order *nisi* (*Reg. Lib.* A. 1762, fol. 119.), against others. (*Id.* fol. 138.) The entry of the hearing for farther directions is as follows:—"14th *June* 1763. This cause coming this present day to be heard by the Right Honourable the Master of the Rolls, for farther directions on the report made in this cause by Mr. *Graves*, one of the Masters of this Court, dated the 17th day of *January* last; and also as to the matter of costs reserved by the decree made on the hearing of

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Defendant permitted to take exceptions to a report after confirmation, without having taken objections.

of this cause the 1st day of *July* 1761, in the presence, &c., upon opening and debate of the matter, and hearing the will of *Bennet Allen*, dated the 8th day of *May* 1750, the will of *Robert Allen*, the said decree, and the said Master's said report read, and what was alleged, &c., His Honor doth order, that this cause do stand over, and that the plaintiff be at liberty to take exceptions to the said Master's said report, in the same manner as if he had taken objections thereto before the said Master." — *Reg. Lib.* A. 1762, fol. 366. The exceptions were argued and overruled. *Reg. Lib.* A. 1763, fol. 184.

In *Hawkins* v. *Day*, " on petition that the Master should review his report, after exceptions thereto taken, argued, and the report confirmed by judgment of the Court, *Lord Chancellor* said he never knew an order to that purpose, and it would be of mischievous consequence; but errors in computation merely, might be set right at any time." (1 *Ves.* 189.) The decree, in that case, directed two accounts: one, of the transactions of a certain partnership; the other, of the assets of *W. French*, deceased, whose representatives were *James Day*, and *Mary* his wife. The Master having made his report, exceptions were taken by the plaintiffs, and by two of the defendants, *James* and *Mary Day*: some of which were waved, one allowed, and the rest on argument overruled. *Lib. Reg.* A. 1747, fol. 452. On the 8th *November* 1748, *James* and *Mary Day* presented a petition, stating that all the exceptions to the report " on both sides related to the account of the said partnership estate, and no one of them to the account of the assets of the said *W. French*:" that the exceptions having been argued, and one relating to a sum of £4 : 13 : 2 allowed, the report " was not in any express terms confirmed; nor was the said report directed to be sent back to the said Master to be rectified, according to the variation which that allowed exception occasioned; nor had any farther proceedings been had thereon: that the petitioners resided at *Bristol*; and the petitioner *James Day* was about seventy years of age, and had employed a solicitor at *Bristol* to defend this cause for them, who again employed his agent in *London* for that purpose; and the petitioners were advised by their said solicitor, that after the said Master's report should be made, in case the said *Benjamin Lane*" (clerk of the partnership, who had become bankrupt and absconded, as was alleged by the bill, largely indebted to the partnership) " should thereby be found to be really indebted to the said copartnership,

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partnership, then the cause would be considered as to the petitioner's case; but no directions having been given at the time when the said exceptions came on to be argued, and the petitioners, since the time the same were so argued, having been acquainted that a great sum was reported to be in their hands of the said *W. French's* assets (which the petitioners well knew could not be right), the petitioners thereupon, for the first time, upon the 11th day of *August* last, got a sight of the said report, and of such of the schedules thereto as related to the said *W. French's* assets, and thereupon did then find, to their very great surprise, many plain mistakes therein to the prejudice of the petitioners which were not discovered or excepted to; and in particular, there were two gross and palpable mistakes therein, never discovered by the petitioner's said solicitor, to the petitioners most apparent wrong, in overcharging them in the said *W. French's* assets by at least the sum of £1129 : 12 : 11, and £1511 : 10 : 6¾ in those instances alone, as follows," &c. The petition, after farther stating particulars of overcharge, prayed that the petitioners might have leave to take exceptions to the report in the particulars before mentioned. The Lord Chancellor was of opinion that it was reasonable under the circumstances of the case, that upon the terms therein after mentioned, *the petitioners should have liberty to re-argue the exceptions formerly taken to the said Master's Report mentioned in the petition*, and to take new exceptions to the said report, relating to the matters complained of in the petition, to come on to be argued at the same time; but the Counsel for the Plaintiff desiring, for the sake of despatch, to avoid such circuity, and the delay and expense which would be occasioned thereby, His Lordship ordered that, upon the said Defendant *James Day* giving his own recognizance within a fortnight from that time, in the penalty of £2000, with condition to pay such sum of money, if any, as should be found due from him upon the balance of the account directed by the decree, to such of the parties to whom the same should be found due, together with interest for the same to that day, at the rate of 4 *per cent. per annum*, in such manner as the Court should direct, and paying to the Plaintiffs such costs as they had been put to by taking out the said Master's last report, so far as the same related to the account of the personal estate and the administration thereof, and the costs subsequent thereto, so far as the same related, &c. and the costs of that application

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Exceptions permitted with reference to one subject of inquiry, after exceptions to the same report with reference to another subject, allowed or overruled on argument.

to the Court, &c. within a week after the taxation or settling thereof, the confirmation (*a*) of the said report should be so far opened as related to the said account of such personal estate, and the administration thereof, and that it should be referred back to the Master to review that part of the said report; and it was farther ordered, that the Master should speed his subsequent report, and that the parties should attend *de die in diem* for that purpose. 21st *December* 1748, Reg. Lib. A. 1748, fol. 115—118. See *Belt*'s Supplement, p. 106.

In *Vallence* v. *Weldon*, 1 *Dick*, 290., stated from the Registrar's book, 1 *Madd.* 340., and *Pennington* v. *Lord Muncaster*, 1 *Madd.* 555., the Court permitted exceptions to be filed by a party who had not taken objections; and exceptions to a report of the insufficiency of an answer have been permitted after a plea and farther answer. *Noel* v. *Ward*, 1 *Madd.* 339. For the cases on the question of opening biddings after comfirmation of the report, see 2 *Madd. Cha.* 383. et seq.

Where the whole matter appears on the report, a question decided by the Master is open at the hearing for farther directions, without exception, *Adams* v. *Claxton*, 6 *Ves.* 226; and errors apparent in the schedules have been corrected after enrolment on a summary application. *Weston* v. *Haggerston*, *Coop.* 134.

On bills of review for correcting error, or supplying deficiency, in a report confirmed, see *Gould* v. *Tancred*, 2 *Atk.* 533. *Worge* v. *Bradley*, 2 *Dick.* 570. *Perry* v. *Phelps*, 17 *Ves.* 183., and *Manaton* v. *Molesworth*, 1 *Eden*, 18.

(*a*) It seems that the report was never in express terms confirmed.

GALLAND *v.* LEONARD.

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Feb. 14. 18.

The words "in case of the death," construed to refer to death in the life of the tenant for life.

Bequest of personal estate being in trust, to pay the interest to *M.* the testator's widow, during her life, and on her death "to pay and divide the trust-monies unto and equally between his daughters *H.* and *A.*, for their own use and benefit absolutely, and in case of the death of them *H.* and *A.*, or either of them, leaving a child or children living," to apply the interest for the maintenance of the children till 21, then to divide the trust-money among them, expressing that the testator's intention was, that the children of his daughters should be entitled to the same shares to which their mother would be entitled if then living, with an ultimate trust in case of the death of *H.* and *A.*, without leaving issue living at their respective death, or of all their children dying minors; on surviving the tenant for life, *H.* and *A.* become entitled to the absolute interest.

FRANCIS MELL, by his will dated the 14th *March* 1810, gave to his wife, *Ann Mell*, the whole or such part of his household furniture, plate, linen, and china, as she chose, for her own use and benefit absolutely, an annuity of 60*l.* for her life, and a legacy of the like amount, and after giving to his daughter *Ann* the sum of 1050*l.*, to be paid on her attaining the age of 21 years, with interest, he gave to *Robert Galland*, *John Leonard*, and *John Spicer*, all his personal estate, not before disposed of, upon trust, to convert it into money, and after payment thereout of all his debts, legacies, and testamentary expenses, "upon trust to place out the residue thereof, at interest upon real or government securities, and continue the same out at interest during the term of the natural life of my said wife *Ann Mell*, except only the said sum of 1050*l.* above given to my said daughter *Ann* on her attaining the age of 21 years, and the interest thereof to be paid to her half-yearly, and upon trust to pay to her my said wife the said annuity of 60*l.* a year for her life in manner aforesaid; and upon her death, then upon farther trust to pay and divide the said trust-monies unto and equally between my said two daughters *Hannah* and *Ann* for their own use and benefit absolutely; and in case of the death of them my said daughters, or of either of them, leaving a child or children living, then upon further trust to continue the same trust-monies out at interest during the minority of such child or children, and in the mean time to apply a competent part of the interest

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thereof towards their maintenance and education, and upon their severally attaining their respective ages of 21 years, then upon farther trust to pay and divide the same unto and equally among them if more than one, and if only one child then the whole to such only child, my will and mind being that the child or children of each of my said daughters shall be respectively entitled to the same share his, her, or their mother would be entitled to if then living; and upon this ultimate trust, that in case of the death of my said two daughters without leaving issue living at their respective death, in the event also happening of all their children dying minors, then my mind and will is, and I hereby direct my said trustees to pay and divide the said trust-monies unto and equally among all and every my nephews and nieces then living, share and share alike, for their own use and benefit absolutely."

The testator died in *May* 1810, leaving his widow and two daughters, (the elder married, and of age; the younger a minor, and unmarried,) and several nephews and nieces. After the death of the widow, in *November* 1810, the suit was instituted by two of the trustees, against their co-trustee, the daughters of the testator, the two children of his married daughter, and his nephews and nieces, for ascertaining the rights of the parties; and the usual accounts having been directed at the hearing, the cause now came on for farther directions.

Mr. *Horne* for the Plaintiffs.

Mr. *Parker* for the daughters of the testator.

Mr. *Duckworth* for the children of the married daughter, and the nephews and nieces of the testator.

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Under this will three distinct claims are made; first, the two daughters of the testator, on the death of the widow,

widow, claim the residue absolutely; next, the children of *Hannah* the married daughter (here represented by the two now in existence) contend that the daughters take only a life-interest, and that the residue devolves to them, after their mother's death, on attaining 21; thirdly, the nephews and nieces of the testator insist on an ultimate title, in the event of the two daughters dying without leaving children who shall attain majority. The difficulty consists in reconciling the terms of different parts of the will, or deciding which part is to prevail. In one passage, the estate is given to the daughters absolutely: then follows a limitation to their children in the event of their attaining 21: the concluding words, it is insisted by the nephews and nieces, confer on them an ultimate interest. Undoubtedly, if the successive clauses of a will are irreconcileable, the rule is to give effect to the last clause, on an idea that the testator may have altered his intent; but a difficulty occurs in applying that rule to this case, because the question here arises on one clause, applicable all to one fund, and scarcely admitting, therefore, the hypothesis of a variation of intent. Being unable, then, literally to comply with every word in the will, the Court must endeavour, offering as little violence as possible to individual parts, to give effect to the whole; and I am satisfied that the true construction is, to declare that, in the actual event, the two daughters are entitled to the absolute property.

The intention of the testator is expressed in the first part by terms too clear to admit of doubt. Having first ordered payment of interest to his wife during her life, he directs his trustees, on her death, to pay and divide the trust-monies equally between his two daughters, — an unequivocal declaration that, on the death of the tenant for life, the fund was to be divided between the daughters; the fund, and not the interest. The construction that the interest only was given to the daughters, departs from the express terms of the bequest. The gift is of the trust-monies for their own use and benefit absolutely; and the testator's

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meaning in these words is ascertained by other parts of the will. No doubt can be entertained that the household furniture, when chosen by the wife, was her's without qualification; but it is given by the same expressions which are applied to this fund. So, in the latter clause, the gift to the nephews and nieces is to their own use and benefit absolutely. In these passages the testator meant to dispose of the entire interest. I cannot but impute to the same words, in the third instance, that meaning which in the other two is clear and undisputed.

He intended, therefore, to give the fund absolutely to his daughters; but then the difficulty arises to reconcile this gift with the subsequent disposition in favor of their children, and of his nephews and nieces. It must be supposed that the testator contemplated two events. He meant that if his daughters survived his widow, they should take the absolute interest; but that if they were not then living to enjoy his property, it should pass to their children, if they left any; or, if they died without children, to his nephews and nieces. That construction reconciles every part of the will, and makes it one continued disposition of the whole fund. The words evidently import contingency; for, varying the phraseology used in the bequest to his wife, he employs the terms "and in case of the death;" and it has been properly observed, that in other instances, when words importing contingency were applied to an inevitable event, as death, they have been understood to denote the occurrence of the event under particular circumstances, as death at a given period, in the life of the testator, or of the tenant for life. The introduction of that qualification required by the expression, reconciles and renders sensible the whole of this disposition; and, in adopting that construction, the Court is warranted by many authorities. By *Lowfield* v. *Stoneham* (a), by *Hinckley* v. *Simmons* (b), by *Turner* v. *Moore* (c), and by *Cambridge* v. *Rous*. (d)

Words importing contingency applied to an inevitable event, construed to refer to the occurrence of the event under particular circumstances.

(a) 2 *Str.* 1261. (b) 4 *Ves.* 160. (c) 6 *Ves.* 567.
(d) 8 *Ves.* 12. See Lord *Douglas* v. *Chalmer*, 2 *Ves. Jun.* 501. *King* v. *Taylor*, 5 *Ves.* 806.

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In the disposition on the event of the death of the daughters, leaving a child or children, the testator changes the expression; and, in appropriate terms, first gives interest, the subject of gift to the daughters being capital only. The declaration of his intention that the children should take the same share to which their mother would have been entitled, "if then living," establishes the title of the daughters. It is clear, that at twenty-one the children are to take an absolute interest; it is equally clear, from this clause, that they are to take the same interest to which their mother would have been entitled if living; the mother, therefore, would have taken an absolute interest; and the construction under which the mother takes a life-interest only, and the children absolute interests, is inconsistent with this explicit declaration. The clause expressing the "ultimate trust," merely takes up the other branch of the contingency; and provision being already made for the death of the daughters leaving children, provides for their death without children.

On the general construction of the will, therefore, the whole fund is to be divided between the daughters, if living at the death of the tenant for life: and, in the actual event, the whole passing under the first clause, the subsequent clauses are inoperative.

The decree declared, that according to the true construction of the testator's will, the Defendants, *Hannah*, the wife of *Francis Rhodes*, and *Ann Mell*, are absolutely entitled to the clear residue of the testator's personal estate equally between them. — *Reg. Lib. A.* 1817. fol. 510.

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A deposition *de bene esse* having been read at the hearing of a cause, it is of course, if any issue is directed, to order it to be read on the trial, notwithstanding an irregularity in the examination, which might have been effectually objected at the hearing. Whether the Court will suppress a deposition taken before commissioners, of whom one is attorney in a cause in *Scotland* between the same parties, on the same question, *quære*.

THE bill prayed that certain articles of agreement, executed by the Plaintiff in favor of his younger brother the Defendant, Mr. *James Gordon*, who disputed the Plaintiff's legitimacy, might be cancelled. On the 4th of *August* 1809, an order was made for taking the examination *de bene esse* of Mrs. *Hannah Gordon*, relative to an alleged private marriage between her and Colonel *Gordon* deceased, before the birth of the Plaintiff. She was accordingly examined on the 24th of *October* following, but on the hearing of the cause at the Rolls in *December* 1816, after her decease, her deposition had not been published, and was not read. The Plaintiff having presented a petition of rehearing, on the 6th of *August* 1817, it was ordered by the Master of the Rolls that her deposition should be published and read on the rehearing, and on the 27th of *November* the Lord Chancellor confirmed that order. At the rehearing before the Master of the Rolls, on the 9th of *December* last, an issue was directed, and on the 12th of *February* 1818, the Plaintiff obtained an order for liberty to read Mrs. *Gordon*'s deposition at the trial. The Defendant Mr. *James Gordon*, having previously given notice of a motion to suppress her deposition, now moved that the order of the 12th of *February*, so far as relates to her deposition, might be discharged, and that the deposition might not be read at the trial.

The affidavits in support of the motion stated, that in 1808 an action in the Court of Session in *Scotland*, still pending, was brought by the Defendant Mr. *James Gordon* against the Plaintiff, founded on the articles of agreement for cancelling which the bill was filed; that one *Thomas Gordon* had acted since the commencement of the action, and still continued to act therein, as the law-agent, attorney,

or

or solicitor of the Plaintiff, particularly on an application for taking the examination of Mrs. *Gordon* relative to the alleged private marriage between her and Colonel *Gordon*; that the commission for the examination of Mrs. *Gordon* (in which none of the Defendants in this cause joined) was directed to five persons, of whom the said *Thomas Gordon* was one, who, as appears by the return, acted in the execution thereof, the examination taking place at the house of the Plaintiff; that the Master of the Rolls having on the 6th of *August* last ordered that Mrs. *Gordon*'s deposition should be published and read at the rehearing, the Defendant Mr. *James Gordon*, on the 8th of *August*, gave notice, for the first seal before *Michaelmas* term, of a motion to rescind that order, (the last seal after *Trinity* term being held on the 5th of *August*); and the motion being heard on the 21st and 22d of *November*, the Lord Chancellor, on the 27th of *November*, affirmed the order of the Master of the Rolls; that on the 28th of *November*, the solicitor of the Defendant Mr. *James Gordon* received notice from the solicitor of the Plaintiff, that the Master of the Rolls had ordered the cause to be advanced to the head of the paper for the 4th of *December*; that the Defendant Mr. *James Gordon* never saw Mrs. *Gordon*'s deposition, although it was published soon after the order of the 6th of *August*, till the 4th or 5th of *December*, nor ever knew previously thereto who were the commissioners named in the commission, or any of them; nor did he know until the middle of *December*, that *Thomas Gordon*, named in the commission, was the agent of the Plaintiff in the *Scottish* cause.

Mr. *Agar* and Mr. *Roupell*, in support of the motion.

The application is in effect, though not in form, to suppress the deposition of Mrs. *Gordon*; and the irregularity on which it proceeds is, that one of the persons to whom the commission was directed, and who acted in the execution of it, was the attorney of the Plaintiff in an action carried on against him in the Court of Session, by the

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Defendant Mr. *James Gordon*, for enforcing the articles of agreement, to cancel which is the object of the present suit. This Court suppresses depositions taken before commissioners, of whom one is the solicitor (*a*), or a clerk of the solicitor (*b*), of the Plaintiff or Defendant; nor will courts of law grant an attachment on affidavits sworn before an agent of either party. (*c*) Commissioners are the ministers, or rather a part, of the Court (*d*); their duties of impartiality and secrecy are incompatible with the character of agent to the suitors. From the earliest times it has been the policy of the Court to prevent the disclosure of the evidence till publication has passed. For that purpose, Chief Baron *Gilbert* advised that the commissioners should be sworn not to divulge the depositions (*e*); and in conformity to that suggestion, an order of the 9th *February*, 1721, directs the commissioners and their clerks to take an oath of secresy. (*f*) In *Cooth* v. *Jackson* (*g*), your Lordship strongly animadverted on the misconduct of commissioners disclosing to either party, even the general effect of the evidence. (*h*) What can be more inconsistent with the spirit of these regulations, than to permit the agent of the party to officiate as commissioner? The Defendants having refused to join in the commission, the Plaintiff himself nominated his solicitor: his solicitor, not in this cause indeed, but in a cause in *Scotland* between the same parties, on precisely the same question, and where the same witness was to be examined to the same point. The Court has suppressed depositions, because reduced into writing by the agent of the Plaintiff (*i*); that was the office to which this Plaintiff appointed his agent.

(*a*) *Fricker* v. *Moore*, *Bunb.* 289. *G. M. Selwyn*, 2 *Dick.* 563. And see Sir *Francis Fortescue* and *Coake's* case, *Godb.* 193.

(*b*) *Newte* v. *Foot*, 2 *Rep. in Ch.* 178. S. C. under the name of *Newton* v. *Foot*, 2 *Dick.* 793.

(*c*) *Rex* v. *Wallace*, 3 *Term Rep.* 403.

(*d*) 6 *Ves.* 30.

(*e*) *For. Rom.* 142.

(*f*) Orders in Chancery, *Ed. Beames*, p. 327—330.

(*g*) 6 *Ves.* 12.

(*h*) See p. 30—32. 41.

(*i*) *Anon. Ambl.* 252.

No

No delay is imputable to the Defendant; he gave immediate notice of his intention to appeal against the order of the Master of the Rolls for the publication of this deposition; and the present application is made as soon as he was apprized of the objection.

Sir *Samuel Romilly*, Mr. *Heald*, and Mr. *Wingfield*, against the motion. The application is altogether irregular; if the Plaintiff's argument is correct, the deposition ought to be suppressed, as unfit to be received, not only on the trial, but for any purpose. But the objection is frivolous; admitting that the questions in the *Scottish* cause and the present are substantially the same, it is clear that this deposition cannot be read there; and it has never been decided that a solicitor in another cause in which the depositions cannot be used, is disqualified to act as a commissioner.

Whatever may be the force of the objection, the Defendant is not competent to insist on it; he has given notice of a motion to read the deposition of a witness, examined before commissioners, of whom one was his own agent in the *Scottish* cause. Can he, at the end of eight or nine years from the examination, after having taken the chance of the deposition, and suffered it to be used, now finding the Court of opinion that it is conclusive against him, upon the allegation of a recent discovery that it was taken before an agent of the Plaintiff, insist that it shall not be read at the trial, himself authorizing the like conduct in his own agent?

Mr. *Agar* in reply.

If any difficulty arises from the form of the notice of motion, the Court will direct the deposition to be suppressed.

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How can depositions which have been read, at the rehearing be suppressed?

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Where the solicitor in the cause has acted as commissioner, the Court suppresses the depositions; but can you argue thence that the same course shall be pursued, if a commissioner is solicitor to one of the parties in another cause? It must be recollected, however, that in this case the struggle is, whether this lady, the mother of the Plaintiff and Mr. *James Gordon*, shall be examined; and it is necessary to ascertain how far the cause, in which the commissioner acted as solicitor to the Plaintiff, was between the same parties and on the same subject. Mr. *James Gordon*'s affidavit denies knowledge of the objection until *December*; but, for any thing that appears, his agents may have possessed earlier information, and their knowledge would conclude him.

The order that depositions shall be read at the trial of an issue is necessary, not to render the depositions evidence, but only to save the expense of proving the bill, answer, and other proceedings. The deposition of a deceased witness, in a suit in chancery, is evidence at law (*a*), after preliminary

(*a*) Sir *Francis Fortescue* and *Coake*'s case, *Godb.* 193. *Anon. Godb.* 326. *pl.* 418. *Benson* v. *Olive*, 2 *Str.* 920. *Tilley*'s case, 1 *Salk.* 286. *Gilb.* on Evidence, 61. *Fry* v. *Wood*, 1 *Atk.* 445. *Bull. N. P.* 239.

In an early collection of Reports in Chancery, the following case occurs:—"Master *Vernon* moved for the Plaintiff that some records and depositions in the Star-chamber and the city of *London*, where the matter hath been examined, may serve here for proofs of the Plaintiff's surmise; and the rather, because some of the witnesses there examined are dead, *and some others are beyond the seas;* therefore it is ordered, that it shall be so as is desired. *Puckly* and others, Plaintiffs; *Bridges* and others, Defendants. *Anno.* 25 *Eliz.*" *Choice Cases in Chancery*, p. 163. The following entry appears in the Registrar's Book:—"*Robert Puckle*, *Richard Huson*, and *Edmund Warner*, Plaintiffs; *Robert Bridges*, Defendant. Whereas the said Plaintiffs have brought the matter in variance between them and the Defendant into this court by special *certiorari*, and now are to make proof of the surmises of their bill exhibited into this court in that behalf; forasmuch as it is informed by Mr. *Vernon*, being of the Plaintiffs' counsel, that there are records and depositions, both in the Star-chamber and in the city of *London*, where the matter hath been examined, which will serve for

nary proof of the bill, answer, and issue joined (*a*); the order is an authority to the judge to receive the evidence without that introductory matter. (*b*)

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As far as I have been able to obtain information respecting the practice of the Court, in a case of this sort, I think, that where a deposition *de bene esse* (to the taking of which any irregularity of any kind might have been effectually objected before the hearing of the cause) has been read at the hearing of the cause, it is of course, if any issue is directed, to order it to be read upon the trial; upon which it should seem, it would not be evidence, being a deposition before issue joined, without such an order. (*c*) It is not necessary, if this be so, to determine what is the effect of a person's being a commissioner employed in the *Scotch* cause, as Mr. *Gordon* was.

The time was certainly very short between the publishing the deposition and the rehearing of the cause; but on the

When the interval is short between the publication and the hearing, the Court will grant time to examine whether the deposition was regularly taken, it being too late to object during the hearing.

for proof of the most of the Plaintiffs' surmises, and that also some of the witnesses then examined are dead, *and some others are in parts beyond the seas,* it is ordered, that the said Plaintiffs may use all the said records and proofs remaining in the aforesaid two places, or either of them, for proof of the said surmises, or any of them, as well as if the same had been extant or made in this court; and that the said Plaintiffs may also make such farther proof thereof as they can in this court." *Pasch.* 17 *April* 1583. Reg. Lib. B. 24 and 25 *Eliz.* fol. 333.

(*a*) In order to show a cause depending, and the parties and questions at issue between them, *Baker* v. *Sweet, Bunb.* 91. *Nightingale* v. *Devisme*, 5 *Burr.* 2594. And see *Illingworth* v. *Leigh*, 4 *Gwill.* 1619.

(*b*) *Palmer* v. *Lord Aylesbury*, 15 *Ves.* 176. *Corbett* v. *Corbett*, 1 *Ves. & Beam.* 395. see p. 396.

(*c*) For the rule on this point, and the exceptions, see —— v. *Browne, Hardr.* 315. *Howard* v. *Tremaine*, 1 *Show.* 363., 1 *Mod.* 146., *Carth.* 265., 1 *Salk* 278. *Piercy* v. ——, *T. Jones*, 164. *Bray* v. *Whitelage Sir T. Raym.* 335. *n. Marsden* v. *Bound*, 1 *Vern.* 331., *Gilb.* on Evidence, 63. *Bull. N. P.* 240. and *Cazenove* v. *Vaughan*, 1 *Maule & Selw.* 4.

other

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other hand, the party should have applied for time to examine whether the depositions published had been regularly taken, (which I think ought, upon a motion, to have been granted, as it seems to be considered in practice, as too late to object when the cause is actually rehearing,) even if it had not been known that a person of the name of *Gordon* had acted as a commissioner, and that fact was known, or might have been known by all concerned, some days before the rehearing, and would have been a sufficient ground for such a motion; and I think, therefore, according to practice, the order to read the deposition on the trial cannot now be discharged.

Motion refused. (*a*)

(*a*) See *Whitelock* v. *Baker*, 13 *Ves.* 511.

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Specific performance of a parol agreement to grant a lease, decreed on the testimony of one witness, confirmed by circumstances, against the denial in the answer, after part-performance by delivery of possession.

THE bill, filed the 10th of *April* 1815, stated, that in *October* 1809, a treaty having been entered into between the Defendant *Jones*, and *Robert Morphett*, the elder, the father of the Plaintiff, in his behalf, *Jones* agreed to grant to the Plaintiff, and *Robert Morphett*, the elder, in behalf of the Plaintiff, agreed to accept, a lease of certain lands, afterwards described, for a term of twenty-one years, to commence from *Old Michaelmas-day* 1809, at a rent of 400*l*. *Jones*, in part performance of the agreement, wrote and signed an authority in writing, to the effect following. "*London*, 7th *October* 1809. To *Robert Morphett*, Esq. I "hereby authorise you to enter the under-mentioned lands "as tenant, on *Wednesday* the 11th instant, being *Old* "*Michaelmas-day*."

Scotney near *Lydd*	- - - -	*Brackenbury* - - -	Looker.
Goose - - -	*New Romney* -	*James Chittenden* -	Ditto.

Crooked

Crooked Elms, Newchurch - }	*John Chittenden* -	Looker.
Pilraggs - - - Ditto - - - }		
Crump Field, St. Mary's - -	*Hoy* - - - - - - -	Ditto.
Corner Field New-bridge -	*Jacob Wratton* - -	Ditto."

The bill farther stated, that the Plaintiff, in pursuance of the agreement and the written authority given in part-performance thereof, entered into possession of the premises, as tenant to *Jones*, in *October* 1809, and continued in possession of the whole until *Old Michaelmas* 1810, paying the rent of 400*l.*, allowance being made thereout of such sums as the Plaintiff was entitled to have allowed; that in *March* 1810, *Jones* being desirous to sell those parts of the lands which were situated in or near *Newchurch*, *St. Mary's*, and *East Bridge*, communicated his desire to the Plaintiff, or his father, in his behalf, by a letter, a part of which, after referring to a pressing demand for money, was in the following words:—" The only way I have of meeting it is, " by selling part of the land. I know of several persons " who would become purchasers, but I wish to give you " the first offer of the whole or any part you may choose. I " shall be inclined to take of you a fair price, inclining to " your advantage. The pieces are, the

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Pilraggs - - - - -	36	70 acres.
Crooked Elms - - -	16	
Crump Field - - -	8	
Corner Field - - -	10	

" You have certainly my promise of a lease, from which I " should be ashamed to swerve; but should you not purchase any part of the land, you see to what disadvantage " I must sell it. I shall be happy to give you the accom- " modation in the *Goose* and *Lydd* land, so as to make up " the term that was to be granted on the whole, or to make " a deduction that may appear fair between us; or, if it " is more to your interest, I will execute the plan first in- " tended, that of a lease on the whole."

The

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The bill also stated, that in consequence of that letter, several meetings took place between *Jones* and *Robert Morphett*, the elder, on the subject of the intended sale; and it was at length finally agreed, that the Plaintiff should give up the land in and near *Newchurch*, *St. Mary's*, and *East Bridge*, being the land specified in the letter; and should continue tenant of the residue of the premises, being the land in and near *New Romney* and *Lydd*, (and in the letter called the *Goose* and *Lydd* land,) for the residue of the term of twenty-one years, to be granted by lease, at the reduced yearly rent of 150*l.*, to commence from *Old Michaelmas-day*, 1810; that after *Jones* had contracted for the sale of the land specified in the letter, he requested the Plaintiff to give up eleven acres of the *Goose* land, retaining in lieu the *Corner Field*, (part of the land previously agreed to be given up for the purpose of sale,) and the Plaintiff having complied with his request, surrendered all the land which he had ageeed to surrender, (namely the *Pilraggs*, *Crooked Elms*, *Crump Field*, and eleven acres of the *Goose* land,) and continued in possession as tenant, at the reduced rent of 150*l.*, of the residue, consisting of the *Corner Field*, and the *Goose* and *Lydd* land (except eleven acres of the *Goose* land given up).

The bill then stated, that in *November*, 1810, *Jones*, being desirous of purchasing the Plaintiff's interest in the last-mentioned lands, communicated his desire to the Plaintiff's father, by a letter, dated 2d *November*, 1810, in which, after referring to his having occasion for money to complete the purchase of some estates, he proceeded thus: "The only resource then left to me, is to dispose of such "part of my property as I may deem less likely to increase "in value, and surely the marsh land is considered in this "state. It therefore remains for me to offer you a con-"sideration for the term you have in it, and I trust such a "one as you will think liberal; for I wish to make no other "than a handsome compensation, which I feel I am bound

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"to do, as well for the inconvenience of your son's leaving "the land, as for the numerous obligations I lie under to "you. I am willing to allow you the rent of the present "year, and up to *Michaelmas* 1811, on condition of your "giving me at that time possession of the land; and I also "engage to continue it to you after that period, in case I "do not sell it, or that *Fenner* does not join in the re-"covery, in which case I cannot make a title. I have "suspended for the present the draft of the lease, until "your decision is known. If it should not meet your ap-"probation, you will find me not swerve from what I have "ever appeared true to, my word. I must then sell "under the greatest disadvantage, which you are well "aware of. I am so well convinced of your liberality, and "of your wish to serve me, that I think you will allow "the compensation equal to the sacrifice."

The bill farther stating that the Plaintiff did not accede to this proposal, but continued in possession of the premises, and paid the rent to *Michaelmas* 1814, on the faith of having a lease, expending large sums in repairs and improvements; and that on the 23d of *March* 1815 he received from *Jones* (who had contracted to sell the premises to the other Defendant, *John Pepper*) a notice to quit at *Michaelmas* next; prayed that the agreements, so far as the former was not altered by the latter, might be performed, and that *Jones* might be decreed to execute to the Plaintiff a lease, pursuant to the terms of the agreement; and that the Defendants might be restrained from proceeding at law for the recovery of the premises, or conveying or contracting to convey them.

By his answer the Defendant *Jones* admitted, that in or about *September* or *October*, 1809, he entered into a treaty with *Robert Morphett*, the elder, in behalf of the Plaintiff, touching the granting a lease of the lands in the bill described as after mentioned, but not otherwise, (that is to say,)

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say,) that the Plaintiff wishing to become the tenant of the premises, it was proposed and agreed generally between the Defendant and *Robert Morphett*, the elder, on the part of the Plaintiff, that the Plaintiff should become such tenant, but nothing was said as to any lease or term of years for which he was to hold the same, except that in the course of the treaty, the Defendant promised generally to grant to him a lease, but he denied that any duration, or the commencement, or termination, or the rent, of any lease, was ever settled and agreed upon, or even mentioned in any way between him and the Plaintiff; and he denied that he ever agreed or promised to grant to the Plaintiff a lease of the premises for a term of twenty-one years, or for any other period, or that the rent to be paid should be 400*l.* a year, but he said that it was originally agreed, that the Plaintiff should become tenant, at a rent to be settled by a mutual friend, who having accordingly valued the land at 3*l.* per acre, thereby ascertained the rent to be 450*l.* Admitting the written authority to take possession dated 7th *October*, 1809, he said that it was for the purpose of putting the Plaintiff in possession as tenant from year to year, without reference to any lease, or agreement for a lease. He also admitted the letter of *April*, 1810, possession taken by the Plaintiff, the transaction for surrendering part of the lands, and remaining tenant (from year to year as he insisted) of the rest, at a rent of 150*l.*, the subsequent exchange of part of the *Goose* land for the *Corner Field*, and payment of rent as alleged in the bill. He denied expenditure by the Plaintiff on the premises, except in cleansing ditches, to which he was bound as tenant from year to year, and claimed the benefit of the statute of frauds. (*a*)

Robert Morphett, the elder, deposed, that some time previous to *Michaelmas*, (old style,) 1809, he entered into a

(*a*) 29 *Car.* 2. *c.* 3.

treaty

treaty with the Defendant *Jones*, for a lease to be granted by *Jones* to the Plaintiff, of all the lands mentioned in the bill for the term of twenty-one years, at a rent to be fixed by one *Martin*; and that about *Michaelmas*, 1809, it was finally settled between *Jones* and the witness, that *Jones* should grant a lease to the Plaintiff for the term of twenty-one years, to commence on the 10th of *October*, 1809, at the rent of 400*l*., *Jones* having agreed to abate 57*l*. from the rent of 457*l*., previously fixed by *Martin*, which *Jones* as well as the witness thought too high; that the Plaintiff took possession, and paid the rent of 400*l*. to the 10th of *October*, 1810; that about *Michaelmas*, 1810, the Plaintiff, at the request of *Jones*, gave up the possession of the *Crooked Elms*, *Pilraggs*, and *Crump-field*, and eleven acres of the *Goose* land; and it was agreed between *Jones* and the witness, that the Plaintiff should pay a rent of 150*l*. for the remainder of the lands, during the remainder of the term of twenty-one years; that the Plaintiff paid that rent to *October*, 1815, and that such payment was made under the contracts between *Jones* and the witness on the part of the Plaintiff; that the Plaintiff had expended about 100*l*. upon the lands now in his possession, with a view to their improvement, and in expectation that *Jones* would grant a lease for twenty-one years, and that the improvements (which he specified) were not such as are usually made at the expense of a tenant from year to year, or as would be made by any tenant who did not expect to have a lease for twenty-one years at least.

John Morris deposed, that on the 2d of *November*, 1810, at the request of *Robert Morphett* the elder, he informed *Jones* that the Plaintiff could not comply with the request contained in his letter of that date, for the delivery of the lands; to which *Jones* replied, that the Plaintiff should have the lease; it would be better for the Plaintiff, but worse for *Jones*; for that he must sell the land, and that he had told Mr. *Morphett* so in the letter.

The Plaintiff gave in evidence the Defendant's receipt for 400*l*. for a year's rent to *Michaelmas*, 1810, and subsequent receipts for the reduced rent of 150*l*.

Mr. *Bell*, Mr. *Roupel*, and Mr. *Sugden*, for the Plaintiff.

The Plaintiff rests his claim on a parol agreement with part performance by delivery of possession.

The agreement is proved by *Morphett* the elder, and it is now settled that the evidence of one witness, corroborated by circumstances, will prevail against a positive denial in the answer. *The East India Company* v. *Donald* (a). Here the denial, applying rather to the terms, than the existence, of the agreement, is not positive, and the circumstances confirming the testimony are irresistible. First, the letters of *Jones* himself: his declarations that the Plaintiff had his promise of a lease from which he would be ashamed to swerve, "and that if required he would execute the plan first intended, that of a lease of the whole;" and his offer of "a consideration for the term which the Plaintiff had in the land:" unequivocal acknowledgments of an agreement to grant a lease. To the same effect is the conversation proved by *Morris*; and in addition we have possession taken of the whole lands, and payment of rent, conformably to the agreement; a subsequent surrender of part of the lands, continued occupation of the rest, and payment of the reduced rent. *Jones*'s proposal in the letter of *November*, 1810, to relinquish a year's rent on condition of obtaining possession at *Michaelmas*, 1811, is inconsistent with the suggestion of a tenancy from year to year, under which he might have compelled the Plaintiff to quit at that time. His expression "draft" of a lease is equally inconsistent. The existence of an agreement for a lease therefore appears from the declarations of *Jones*; the terms are ascertained by parol evidence; and an act of part-performance is proved in the delivery of possession under a written autho-

(a) 9 *Ves*. 275.; and see *Pilling* v. *Armitage*, 12 *Ves*. 78.

rity

rity from *Jones*. From the date of Lord *Aylesbury's* (*a*) case, it has been established that delivery of possession, as an act of part-performance, excludes the application of the statute of frauds (*b*); upon the principle that without referring the possession to the agreement, the party admitted into possession would be a trespasser (*c*); having no other title, his possession is *primâ facie* to be referred to the agreement, and it is not competent to the person by whom he was admitted to take and to retain possession, to represent that possession as a trespass. (*d*) Possession taken of a farm is a strong act of part performance, the beneficial occupation of such property requiring considerable expenditure. Another act of part-performance was the relinquishment of a part of the lands, and the continued occupation of the remainder at a reduced rent.

The terms of the agreement are clearly ascertained, but after acts of part-performance, according to the doctrine of more than one case, the Court will not be prevented from executing an agreement, by a difficulty in ascertaining the terms. (*e*) Admitting that all the terms of this agreement are not ascertained in writing, the parol evidence supplies that defect; and it is settled that the terms of an agreement which has been in part performed may be proved partly in writing, and partly by parol. (*f*) It would indeed be most inconsistent were the Court, which admits parol evidence of the whole agreement, to reject it of a part, because the rest had been reduced into writing.

(*a*) 2 *Str.* 783. The cases are collected by Mr. *Sugden*, Law of Vendors, p. 99.

(*b*) 29 *Car.* 2. *c.* 3.

(*c*) *Clinan* v. *Cooke*, 1 *Schoales & Lefr.* 41.

(*d*) *Gregory* v. *Mighell*, 18 *Ves.* 333.

(*e*) 5 *Vin. Abr. p.* 522. *pl.* 38. *p.* 523. *pl.* 40.

(*f*) *Allan* v. *Bower*, 3 *Bro. C. C.* 148. See the cases collected by Mr. *Sugden*, Law of Vendors, *p.* 110. *et seq.*

 Mr. *Hart*,

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Mr. *Hart*, and Mr. *Joseph Martin*, for the Defendant.

The Plaintiff alleges an agreement for a lease of certain lands during twenty-one years at a rent of 150*l.*; but the proof by which he endeavours to substantiate that allegation is defective. The written evidence is only of a tenancy, or a promise of a lease, without specification of terms; and he cannot, in violation of established principles, be permitted to introduce supplemental parol testimony. Whatever form the Plaintiff's case assumes, whether that of a written agreement, to be aided by parol proof, or a parol agreement to be aided by written proof, it proceeds on a confusion of the rules of evidence.

Possession was taken under the written authority, and it is too clear for argument, that parol evidence cannot be received to add terms not contained in the writing. The letters afford evidence not of an agreement but of a promise: the proposal to abandon a part of the land, and the subsequent abandonment by the Plaintiff, are inconsistent with the existence of a valid agreement. No circumstance confirming the statement of the witness, the positive denial in the answer must prevail.

Assuming the existence of a parol agreement, the Plaintiff next contends that the possession taken by him was an act of part-performance. The Court will not accede to a doctrine so unauthorized and so perilous; which would enable every tenant from year to year to give parol evidence of agreements, comprehending even the fee-simple of the lands. The principles on which that doctrine is said to rest have no application to the present case. Possession here incurs no expense; and being justified by the written authority, in the character of tenant from year to year, it could not be treated as a trespass. The *dictum* of Lord *Redesdale*, in *Clinan* v. *Cooke* (*a*), is

(*a*) 1 *Schoales & Lefr.* 41.

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is adverse to the Plaintiff's argument, since it, implicitly at least, limits the effect of possession, as an act of part-performance, to cases in which the person taking possession might, upon any other construction, be treated as a trespasser. In strictness, the act insisted on by the Plaintiff is not the taking, but the continuance of possession.

The surrender of one portion of lands held under a prior agreement, is not an act of part-performance of a new agreement for holding the rest. It would be most dangerous to establish that such partial relinquishment of possession, a transaction common between landlord and tenant, enables the tenant to give parol evidence of any alleged agreement relative to the lands. The Court will not extend those doctrines of very doubtful policy, by which the statute of frauds is to a great extent repealed.

The MASTER *of the* ROLLS.

The first question is, whether, by any act of part-performance, this case is exempted from the operation of the statute of frauds. (*a*) In order to amount to part-performance, an act must be unequivocally referrible to the agreement; and the ground on which courts of equity have allowed such acts to exclude the application of the statute, is fraud. A party who has permitted another to perform acts on the faith of an agreement, shall not insist that the agreement is bad, and that he is entitled to treat those acts as if it had never existed. That is the principle, but the acts must be referrible to the contract. Between landlord and tenant, when the tenant is in possession at the date of the agreement, and only continues in possession, it is properly observed that in many cases that continuance amounts to nothing; but admission into possession having unequivocal reference to contract, has always been considered an act of part-performance. The acknowledged possession of a stranger in the land of another is

(*a*) 29 *Car.* 2. *c.* 3.

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not explicable except on the supposition of an agreement, and has therefore constantly been received as evidence of an antecedent contract, and as sufficient to authorize an inquiry into the terms; the Court regarding what has been done as a consequence of contract or tenure. The fact of possession here is proved, and proved in writing, by the regular authority transmitted to *Morphett* the elder, to deliver possession to the Plaintiff, and it is beyond doubt, that possession was taken under some agreement. The existence of a contract is indeed admitted by the Defendant; and the single question is, what are its terms?

To a certain extent both parties are agreed; as to the fact of a contract, the quantity of land, the agency of *Morphett* the elder, repeated meetings relative to a treaty, and possession taken under some contract, either for a tenancy from year to year, or a future lease. The Defendant alleges that the contract was not obligatory, the period for which the lease was to be granted not being specified; and that possession was taken on the understanding that the terms would be ascertained when the parties met. On the other hand it is said, and proved by *Morphett* the elder, who made the agreement, that it was not a mere promise of a lease, but included a specification what that lease was to be; to commence from *Michaelmas-day*, 1809, at a rent to be fixed by *Martin*, afterwards reduced by the parties to 400*l.*, and for a period of twenty-one years. Supposing this representation correct, here are all the parts of a complete contract: the quantity of land, the parties, landlord and tenant, the rent, and the term; but it is said that this statement is denied by the Defendant, and he certainly swears positively, that the term was never fixed. The question is, whether the testimony of *Morphett* the elder is sufficiently corroborated; it being clear that the testimony of one witness, supported by collateral circumstances, may prevail against the positive oath of a Defendant.

fendant. I think that all that passed strongly confirms his statement of the case. The fact that the parties ascertained the quantum of rent is cogent presumptive evidence that they had ascertained the duration of the lease. In fixing a rent, the first question is, for what term is it payable, for one year or for many years? Under a promise of a lease it would be premature to fix the rent before the parties were agreed on the term. From the time when the rent was fixed to the year 1815, when notice to quit was given, nothing passed farther to ascertain the terms of the agreement; and the continual payment of rent during that interval is a circumstance most improbable, on the supposition that those terms were still unascertained.

It is said, that the written authority to take possession is an agreement in writing, and that the Court is not at liberty to resort to parol evidence of the terms. I cannot so consider that document. It is the consequence of an antecedent agreement, not the agreement itself; and it must not escape attention, that it coincides in time with the parol agreement proved. The next act is the letter of *March*, 1810, written five months after the contract, nothing having intervened to render the situation of the tenant more permanent. I cannot interpret that letter, as referring to a mere vague promise. Written in a style the reverse of imperative, expressly mentioning a lease, and evidently supposing in the tenant a title to a term; to me it seems the letter of a landlord, bound by an equitable contract. It is then argued, that the relinquishment by the plaintiff of a large portion of the land repels the supposition of a right; but the transaction consisted not only in the surrender of seventy acres, out of 150, but in the reduction of rent from 400*l.* to 150*l.* Is that no advantage to the tenant? Of 150 acres, which he held at a rent of 400*l.*, he retains eighty at a rent of 150*l.* That might be a fair inducement to relinquish his right to the rest. With re-

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spect to the quantum of rent, the receipt is strong evidence that it was 400*l.*, not 450*l.*; no reason can be assigned for giving a receipt for a total of 400*l.* unless that sum was the rent. The letter of *November*, 1810, is evidence still stronger. After the lapse of near a twelvemonth, nothing having passed to render the tenancy more fixed, the Defendant not only addresses to the Plaintiff a request to relinquish possession of the land, but offers a considerable sum, two years' rent, as a satisfaction of some supposed right. It is said, that the Defendant, being a man of strict honor, might desire to purchase a release from his promise; he might so: but in *March*, 1815, when the Plaintiff had the same claim on his honor, he sold the estate, and gave him notice to quit. Had this obligation of honor, still remaining unsatisfied, lost in 1815 the authority which it possessed in 1810? At that time his urgent application had received a refusal well calculated to provoke the assertion of whatever right he possessed. The acquiescence of a disappointed man affords strong evidence of a contract. The testimony of *Morphett* is corroborated by the transaction which *Morris* proves; and on the whole, I think the circumstances abundantly sufficient to confirm the statement of the witness; and that the Plaintiff has established a parol agreement in part performed. The first agreement being once fixed, such as equity will enforce, the second only reduces the quantity of land, and of rent, leaving the original good as to the residue.

Specific performance decreed with costs.

" His Honor doth order and decree, that the agreements, so far as the former is not altered by the latter, be specifically performed and carried into execution; and it is ordered, that the Defendants do execute to the Plaintiff a proper lease accordingly; and it is ordered, that the Defendant, *J. G. Jones*, do pay to the Plaintiff the costs of this suit to the present time, including the costs of this decree," &c. Reg. Lib. B. 1817. fol. 857.

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The Honorable ROBERT CURZON and HARRIET ANNE his Wife, - - - PLAINTIFFS;

Feb. 5. *July* 29.

AND

The Right Honorable CECIL BARON DE LA ZOUCH and Dame HARRIET ANNE his Wife, THOMAS RHOADES and JOS. ROSE, DEFENDANTS.

A demurrer and answer filed by a Defendant attached for want of an answer, after orders for time to plead, answer, or demur, not demurring alone, ordered to be taken off the file.

THE Defendant *Thomas Rhoades* having obtained two orders for time to plead, answer, or demur, not demurring alone, which had expired, was taken under an attachment issued against him for not answering on the 13th of *November*, 1817, and on the 27th of that month filed a demurrer and answer. On the 5th of *December* the Vice Chancellor ordered the demurrer and answer to be taken off the file. On the 24th of *December* the Lord Chancellor ordered the Six-clerk to restore the demurrer and answer to the file, with liberty to the Plaintiffs to make such application as they should be advised concerning the same. (*a*) The Plaintiffs now moved that the demurrer and answer might be taken off the file.

Mr. *Bell*,

(*a*) In explanation of the proceedings in this cause which, on the first view, seem scarcely consistent, the following account of them is subjoined from the Registrar's book.

VICE CHANCELLOR, *Friday*, 5th *December*, 1817. Upon motion, &c. by Mr. *Pepys*, of counsel for the Plaintiffs, it was alleged that the Defendant *Thomas Rhoades*, on the 10th day of *June* last, obtained an order for six weeks time to plead, answer, or demur (not demurring only), to the Plaintiffs bill, and a commission to take the same, with the usual directions, and that the said Defendant, on the 28th day of *July*, obtained another order for a month's further time to plead, answer, or demur (not demurring only), but that order was to be peremptory; that the said Defendant not answering within the time thereby limited, the Plaintiffs, on the 13th day of *November* last, caused an attachment to be issued out of this Court against the said Defendant

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Mr. *Bell*, and Mr. *Pepys*, for the motion.

It has been repeatedly decided that a Defendant who has obtained an order for time to answer only, cannot file an

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Defendant for want of his answer, returnable, &c. and a *cepi corpus* has been returned thereon; but on the 27th day of the same month of *November*, the said Defendant filed a demurrer and answer, which the Plaintiffs are advised is irregular; it was therefore prayed that the said demurrer and answer may be taken off the file for irregularity, with costs to be taxed, &c.

Whereupon, and upon hearing Mr. *Wilbraham*, of counsel for the said Defendant *T. Rhoades*, this Court doth order, that the said demurrer and answer be taken off the file of this Court for irregularity, and that the Defendant *T. Rhoades* do pay to the Plaintiffs their costs occasioned by filing the said demurrer and answer, and of this application, to be taxed, &c. Reg. Lib. A. 1817. fol. 81.

24th *Dec.* 1817. Upon opening of the matter, &c. to the Lord High Chancellor, &c. by Sir *Samuel Romilly* and Mr. *Wilbraham*, of counsel for the Defendant *Thomas Rhoades*, it was alleged that by an order made in this cause, bearing date the 5th day of *December*, 1817, it was ordered that the demurrer and answer filed in this cause by the Defendant *T. Rhoades* to the Plaintiffs' bill should be taken off the file, and by another order made in this cause bearing date the said 5th day of *December*, 1817, stating that an attachment having been issued against the Defendant *T. Rhoades* for not answering the Plaintiffs' bill directed to the sheriff of *Sussex*, he had returned a *cepi corpus* thereon, it was thereupon ordered that the messenger attending this Court should apprehend the said Defendant, and bring him to the bar of this Court to answer his contempt, whereupon such further order should be made as should be just; that it appearing by the affidavit of *L. H.* agent in this cause to the Defendant *T. Rhoades*, that the demurrer and answer of the said Defendant *T. Rhoades* was sworn and filed on the 27th day of *November* last, and that so soon as the same had been sworn the said *L. H.* went to the office of Messrs. *L.* and *B.*, the Plaintiffs' solicitors, and saw and informed the said Mr. *L.* thereof, and very soon afterward, on the same day, happening to be in the Six-clerks' office at the seat of Mr. *J.*, the said Mr. *L.*

an answer and demurrer, *Kenrick* v. *Clayton* (*a*), *Taylor* v. *Milner* (*b*), *Mann* v. *King* (*c*), nor even obtain an order for time

(*a*) 2 *Bro. C. C.* 214. 2 *Dick.* 685. (*b*) 10 *Ves.* 444.
(*c*) 18 *Ves.* 297. and see *Dyson* v. *Benson*, *Coop.* 110. *Bruce* v. *Allen*, 1 *Madd.* 556.

Mr. *L.* came there, and in the hearing of the said *L. H.* bespoke an office-copy of the said demurrer and answer of the said Mr. *J.*, and believes that such office-copy was accordingly made for, and delivered to, the said Messrs. *L.* and *B.*; that in the bill of costs of the said Messrs. *L.* and *B.*, carried into Master *Thompson's* office, pursuant to the order made in this cause for taking the said demurrer and answer off the file, the first charge in the said bill is a sum of 2*l.* 7*s.* 10*d.* as paid for office-copy of the said demurrer and answer, which charge was, on the taxation of the said costs, claimed by, and allowed to, the said Messrs. *L.* and *B.* accordingly; that although the Plaintiffs' notice of motion for the taking the said demurrer and answer off the file was given for the 5th day of *December* instant, yet his Honor the Vice Chancellor did not decide thereon for several days afterwards, nor did the said *L. H.* hear of his Honor's decision on the said motion until the 11th day of the said month of *December;* and upon hearing thereof the said *L. H.* called the same day at the office of the said Messrs. *L.* and *B.*, to have seen the said Mr. *L.* who attends to this cause on the part of the Plaintiffs, to have requested him not to make any adverse motion or take any hostile proceedings against the said Defendant *T. Rhoades*, as the same were quite unnecessary, he the said *L. H.* being about to write to him to come to *London* forthwith to put in his answer in lieu of the said demurrer and answer; but the said *L. H.* was informed at the said office of the said Messrs. *L.* and *B.*, that the said Mr. *L.* was not within, nor did the said *L. H.* see him on the said 11th day of *December* as he wished to have done, and therefore he the said *L. H.* called upon him again on the following day, but he was not then within; however the said *L. H.* in his search met with the said Mr. *L.* in *Lincoln's Inn Hall*, when the said *L. H.* made to him the request which he intended to have made on the preceding day as above mentioned, and the said Mr. *L.* in answer stated to the said *L. H.*, that an order of this Court had already been put into the hands of Mr. *P.* the messenger for the apprehension

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time to plead, answer, or demur, not demurring (a) alone. Can a Defendant against whom process of contempt for

(a) *Penn* v. *Lord Baltimore*, 1 *Dick.* 273.

* not

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apprehension of the said Defendant *T. Rhoades*, which information the said *L. H.* for some time hesitated to credit, imagining that the said Mr. *L.* was only in jest, and conceiving it hardly possible for the motion to have been made, and the order drawn up subsequently to the said decision of his Honor the Vice Chancellor; however the said Mr. *L.* gave the said *L. H.* to understand that such was the case, and the said *L. H.* then remonstrated with Mr. *L.* on so harsh and unnecessary a proceeding, and entreated him to stop the execution of the order, and to give the said *L. H.* a note to the messenger to that effect, which the said Mr. *L.* declined doing, but he subsequently consented to accompany the said *L. H.* to the said messenger, and having afterwards met with Mr. *P.* the messenger in the street, he informed the said Mr. *L.* and the said *L. H.* that his deputy had gone to *Chichester* on the evening of the 11th by the mail to bring up the said Defendant, and the said *L. H.* then again complained of the hardship of the proceeding, and the said Mr. *P.* excused himself by pleading his duty, and having acted according to the instructions of the said Messrs. *L.* and *B.*, and he offered to write a note to his deputy to discharge the said Defendant *T. Rhoades* out of his custody, on the said *L. H.* undertaking for his appearance, and agreeing to consider the said Defendant in his the said *L. H.*'s custody, provided the said Mr. *L.* would consent to his so doing, and the said Mr. *L.* did thereupon write a note to the said Mr. *P.* signifying such consent, as the said *L. H.* understood, and the said Mr. *P.* then wrote such note as he had before offered to do, and his said deputy on the *Monday* following put the order and the warrant into the hands of the said *L. H.*, and told the said *L. H.* that he must consider the said Defendant in his custody; and that the said *L. H.* discovered that the said order for the arrest of the said Defendant was dated on the said 5th day of *December* instant, and that the said *L. H.* had never any intimation whatever of any intention to move for a messenger against the said Defendant, nor did he know of such a step having been taken until he saw the said Mr. *L.* on the said 12th day of *December*, and saith he has been informed and believes, that the said de-

murrer

not answering has issued, be in a better situation? The general rule is, that a party in contempt cannot demur; the Defendant must prove that that rule applies only to a demurrer to the whole bill. In *Newton* v. *Dent* (*a*), Lord *Hardwicke* discharged a plea filed by a Defendant attached for not answering: *a fortiori* his demurrer, which in contradistinction to a plea or answer is always considered as

(*a*) 1 *Dick.* 234.

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murrer and answer were not taken off the file of this Court until the same 11th day of *December;* it was therefore prayed that the order made in this cause dated the 5th day of *December* instant, authorising the demurrer and answer filed in this cause by the Defendant *T. Rhoades* to be taken off the file, and also the order made in this cause also dated the 5th day of *December* instant, whereby it was ordered that the messenger attending this Court should apprehend the said Defendant *T. Rhoades*, and bring him to the bar of this Court to answer an alleged contempt for not answering the said Plaintiffs' bill, may be respectively discharged, and that the said demurrer and answer, if taken off the file, pursuant to the said first-mentioned order, may be restored, or that the said Defendant may have a further reasonable time to plead, answer, or demur to the said Plaintiffs' bill, not demurring alone, and may be discharged out of the custody of the messenger of this Court: Whereupon, and upon hearing Mr. *Pepys*, of counsel for the Plaintiffs, and the said orders of the 5th day of *December* instant, the said affidavit of *L. H.*, an affidavit of *J. L.*, and an affidavit of *J. H.*, his Lordship doth order, that the order for a messenger of the 5th day of *December* be discharged, and that the said Defendant *T. Rhoades* be discharged out of custody; and it is ordered that the Six-clerk do restore the said demurrer and answer to the file, and the Plaintiffs are to be at liberty to make such application to this Court concerning the same as they may be advised; and it is ordered that the Plaintiffs do pay the costs of, and incidental to, the said order of the 5th day of *December* for a messenger, and of this aplication, to be taxed, &c., and the Defendant *T. Rhoades* is not to be subject to any costs of, or relating to, the said messenger, or of the said order for taking the said demurrer and answer off the file. Reg. Lib. A. 1817. fol. 169.

A Defendant having filed an answer and demurrer after a *cepi corpus* returned on an attachment for not answering, an order for a messenger obtained before the demurrer and answer (of which the Plaintiffs had bespoken an office-copy) had been taken off the file, discharged with costs.

dilatory

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a dilatory (*a*), is irregular. A Defendant under an attachment cannot, without answering, satisfy the words of the writ, the endorsement is "by the Court for not answering;" and Chief Baron *Gilbert* says, "the form of the attachment being *ad respondendum de contemptu per ipsum nobis illatum, et ad faciendum ulterius et recipiendum quod dicta curia consideraverit*, he must answer as well as clear his contempts at the same time. (*b*) The expressions of Lord *Hardwicke* in *Dupont* v. *Ward* (*c*) imply that the Defendant, who had been attached for not answering, would not have been discharged without an answer. In a very recent case (*d*), the present Vice Chancellor has decided that after an attachment for want of answer, the Defendant cannot have a special commission to take his plea, answer, or demurrer.

The irregularity being clear, the only question is whether the demurrer should be expunged, or the whole writing taken off the file? The latter is the correct course, because the writing being contrary to the rule of practice is a nullity, and because by the expunction of the demurrer, an answer would remain purporting to be an answer to part of the bill.

The act of the Plaintiff in taking an office-copy is not a waiver of the objection, but the only mode by which the Court can be informed whether the writing is an answer or a demurrer.

Sir *Samuel Romilly* and Mr. *Wilbraham* against the motion.

No decision has been cited that a Defendant attached for not answering after having obtained orders for time to plead, answer, or demur, not demurring only, is not entitled to file an answer and demurrer. Cases in which orders

(*a*) *East India Company* v. *Campbell*, 1 *Ves.* 246.
(*b*) *For. Rom.* 72. (*c*) 1 *Dick.* 133.
(*d*) *Broughton* v. *Jones*, 3 *Madd.* 42.

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for time to answer only have been obtained are not analogous to the present; by that proceding the Defendant submits to answer, and precludes himself from the privilege of demurring. It is not competent to him afterwards to enlarge the terms of the indulgence which he has sought; the subsequent orders must be conformable to the preceding. (*a*) *Newton* v. *Dent*, the only case similar to this, proves too much; for it will not now be disputed that the Defendant might have filed a plea to the whole bill. (*b*) The meaning of the rule that a Defendant attached for not answering must answer, is that he must not evade answering by a demurrer merely for delay; and that rule is not infringed by a Defendant who having answered every part of the bill which he is bound to answer, demurs to the rest. An answer and demurrer form a substantial defence, as distinguished from a demurrer alone; a distinction recognized by the Court in the form of orders for time. It is not disputed that by his answer the Defendant might in effect have demurred, submitting that he was not bound to answer those parts to which he now demurs. To that answer exceptions might have been taken; and the Court would then have determined on exceptions the points which it is now solicited to determine on demurrer. Such is the importance of the question which the Plaintiffs agitate; whether the Defendant must use the form of answer or demurrer, to protect himself from giving an answer to interrogatories which require none; for it cannot be pretended that a Defendant, by the circumstance of being in contempt, is bound to answer interrogatories impertinent, or tending to subject him to a penalty. I defy the Plaintiffs to state a distinction in principle between the situation of two Defendants not having answered, of whom

(*a*) *Mann* v. *King*, 18 *Ves.* 297.

(*b*) *Anon.*, 2 *P. Wms.* 464. *Roberts* v. *Hartley*, 1 *Bro. C. C.* 56. 2 *Dick.* 554., and see 3 *P. Wms.* 81. In *Lloyd* v. *Gunter*, 1 *Vern.* 275. the plea was filed after attachment with proclamation, and under a commission to take the answer only.

one

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one obtains an order for time to plead, answer, or demur, not demurring alone, and the other becomes the object of an attachment. The Court allows time to answer and demur, and the party clearing his contempt may use the same defence as if he had obtained an order for time.

Mr. *Bell* in reply.

The question of practice is highly important. If a demurrer to part of a bill may be filed after an attachment, additional means of delay will be afforded to litigious Defendants. Dishonest executors, seeking to retain money in their hands, in addition to the established course of an attachment for not answering, followed by an insufficient answer, will be entitled to interpose a demurrer; and a new dilatory will be added to the records of the Court. If the Defendant may file a demurrer and answer after an attachment for not answering, why not in the last stage of the process of contempt?

The LORD CHANCELLOR.

In many cases practice gives a construction to the term answer. If of the interrogatories in the bill, some require an answer, while others tend to criminate the Defendant, is it not clear that he might by answer insist on not answering the latter interrogatories? Suppose the case of a bill in which there was not one question that the Defendant could answer without subjecting himself to a penalty.

Mr. *Bell*.

The Defendant must protect himself by answer, submitting that he is not bound to answer farther. If this demurrer is overruled, can we resume the process where we left it, as in the instance of an insufficient answer? That uncertainty shows the novelty of the attempt.

The LORD CHANCELLOR.

The regular course, no person in Court knowing the practice, would be to direct the Master to certify what it is;

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is; but thinking that that step would not advance us nearer to the end, I will take time for consideration in order to settle this question, and those which have been raised in the course of the argument.

July 29.

The Lord Chancellor.

The application in this case was to take the answer and demurrer off the file; and I have given a great deal of consideration to the question. An answer and demurrer having been filed, there is an answer; and it has been the opinion of some of my predecessors that the proper course is to overrule the demurrer and let the answer stand; on consideration I think otherwise, because by overruling the demurrer you admit that it was regularly filed. I am of opinion, therefore, that the order of the Vice Chancellor was right, and that both the demurrer and answer must be taken off the file. (*a*)

On

(*a*) In *Taylor* v. *Milner*, 10 *Ves.* 444. it seems to have been considered that the demurrer being coupled with an answer, could not be taken off the file; a proceeding not permitted by the modern practice on the amendment of answers. See *Edwards* v. *M'Leay*, 2 *Ves. & Beam.* 256. and the references in note (*a*), p. 257.; to which may be added *White* v. *Godbold*, 1 *Madd.* 269. By one of Lord *Clarendon*'s orders, (copied from an article in the Orders of the Lords Commissioners, published in 1649, *Beames*, Orders, App. p. 496, 497.), after a contempt duly prosecuted to an attachment *with proclamation returned*, no commission to answer shall be made, nor any plea or demurrer admitted, but upon motion in court, and affidavit made of the party's inability to travel, or other good matter to satisfy the Court touching that delay. (Orders in Chancery, *Ed. Beames*, p. 178.; and see the references in *n.* 51.) "The reason why upon the first contempt on the attachment, they allow a commission to issue, or a plea or demurrer to be put in, is, because it does not appear to be an affected delay, and therefore, upon tendering the costs of the attachment, the Defendant may take his commission, and, upon like tender, the plea and demurrer are to be received. But if there regularly issues an attachment with proclamation, the Defendant cannot of course purge his contempt by a mere tender, but he must apply to the Court, to show that his plea and demurrer are proper, and to exhibit a proper excuse for his delay, that the Court may see that there is no farther likelihood of delay by the plea

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On the motion of Sir *Samuel Romilly*, a month's time to answer was given to the Defendant *Rhoades*. (*a*)

July 30.

" His Lordship doth order that the said demurrer and answer be taken off the file, and it is ordered that the Defendant *T. Rhoades* do have a month's time to answer the Plaintiffs' bill, and it is ordered that the said Defendant do pay unto the Plaintiffs the costs of this application to be taxed, &c." Reg. Lib. A. 1817. fol. 1689.

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plea or demurrer put in, or by the commission to answer granted." (*Gilb. For. Rom.* p. 71.) In the present case, this distinction between the two species of attachment was not insisted on. It is clearly settled that a mere denial of combination by answer does not satisfy the undertaking not to demur alone. *Lansdown* v. *Elderton*, 8 *Ves.* 526. *Lee* v. *Pasco*, 1 *Bro. C. C.* 78. *Stephenton* v. *Gardiner*, 2 *P. Wms.* 286. *Attorney-General* v. ———, 4 *Vin.* 442. *Ch.* W. a. *Mitf. Plead.* p. 171., and cases cited in note (*r*). A demurrer may be filed at any time before process of contempt has been issued, or an order for time obtained, though the period for answering is expired; *East India Company* v. *Henchman*, 3 *Bro. C. C.* 372. *Sowerby* v. *Warder*, 2 *Cox*, 268.; but not, as it seems, after an injunction issued upon a *dedimus potestatem* to take the Defendant's answer. *Edmonds* v. *Savery*, 3 *Mer.* 304.

After a demurrer overruled time to answer can be obtained only on a special application.

(*a*) In *Griffith* v. *Wood*, 1 *Ves. & Beam.* 541., after a demurrer overruled, an order for a month's time to plead or answer was made on motion of course; but in *Jones* v. *Saxby*, Lincoln's Inn Hall, 12th *Dec.* 1814, two of the Defendants, after a demurrer overruled, having obtained an order of course, by petition to the Master of the Rolls, for six weeks time to plead, answer, or demur, not demurring alone, the Lord Chancellor, on the motion of Mr. *Combe*, discharged the order for irregularity, stating his clear opinion, that after a demurrer overruled time to answer can be obtained only on a special application. Reg. Lib. A. 1814, fol. 99.

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HILL *v.* SMITH.

ROLLS.
March 2.

Bequest of 3000*l.* stock to *W.*, the testator's son by a first marriage, (his second wife and a son by her being living,) the interest to be appropriated to his maintenance under the direction of trustees till he attained 24, and of the residue of the testator's personal estate, (the interest being given to his wife during her widowhood, after her decease or marriage) "unto any child or children I may have by my wife, to be equally divided between them that attain the age of 21 years, the survivor of my children to possess what is here bequeathed to the other, but should not either of my children attain the age of 21 years, or live to possess what is here bequeathed to them, I then bequeath" to the children of the testator's sister the 3000*l.* stock; the son by the second marriage dying in the life of the testator, and there being no other issue of that marriage; *W.* is entitled to the stock and to the residue.

THE question in this case arose on the will of *William Hill*, dated the 5th of *August* 1811. "As for and concerning all my worldly affairs and effects, I dispose of as follows: *Item*, I give and bequeath unto my son *William Hill* 3000*l.* stock in the 3 *per cent.* consols. and reduced, free from all deductions whatever, and what may be short of that amount in those funds at my decease, to be made up out of my other effects, within the space of one year after, and the interest arising therefrom to be appropriated to his maintenance and support, under the direction of his trustees herein named." The testator then appointed two persons trustees of his son till he attained the age of twenty-four years; and after bequeathing to his son his watch and a book-case, and to his wife 300*l.* and some furniture, and to his sister *Ann Paskley* 50*l.*, proceeded in the following words. "I farther will and direct that my lease, stock, and utensils in trade, with my other property and effects not herein disposed of, shall be sold, either by public or private sale as my executors may think best, as soon as possible, but not exceeding one year after my decease; and the monies arising therefrom to be immediately vested in the funds, and the interest thereon I give and bequeath unto my wife *Betsey* for and during her natural life, provided she remains a widow; and after her decease or marrying, I give and bequeath the said stock and interest arising from the residue and remainder of my estate and effects, unto any child or children I may have by my wife *Betsey*, for to be equally divided between them that attain

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the age of twenty-one years, the survivor of my children to possess what is here bequeathed to the other; but should not either of my children attain the age of twenty-one years, or live to possess what is here bequeathed to them, I then further will and bequeath unto the children of my aforesaid sister *Ann Pashley* widow, by her late husband *Robert Pashley*, the 3000*l.* stock in the 3 *per cent.* consols. and reduced, left to my son *William*, on their attaining the age of twenty-one years, equally divided between the survivors of them, share and share alike, the interest on which my said sister *Ann Pashley* may receive during the term of her natural life, if she remains a widow, and require it, without being liable to be called to account as to the disposal of the same."

The testator appointed his wife executrix and *Thomas Smith* and *James Williamson* executors.

At the date of his will the testator had two children; the Plaintiff, his only son by a former wife, and by his second wife, a son who died in infancy during the testator's life.

The testator died in the year 1813, leaving his wife surviving, and the Plaintiff his only child. On the 30th of *September* 1815 the widow died, and the Plaintiff, having in *July* 1815 attained the age of 24 years, in *November* following, filed the present bill, praying a transfer of the 3000*l.* 3 *per cent.* reduced annuities; a declaration that on the death of the widow, he became entitled to the residue of the testator's personal estate not specifically bequeathed, and the consequential accounts.

Mr. *Bell* and Mr. *Garratt* supported the claims of the Plaintiff for reasons fully stated in the judgment.

Mr. *Cooke*,

Mr. *Cooke*, for Mrs. *Pashley* and her children.

The sum of 3000*l.* stock is expressly bequeathed to the children of Mrs. *Pashley*, on failure of issue by the second marriage attaining 21; the residuary bequest lapsing in that event, the testator considered the share of the residue to which his eldest son would become entitled, a sufficient provision. The residue is given to the children of the second marriage only, and on failure of such children devolves as undisposed of to the next of kin. The claim of the executors is excluded by the express intention of the testator to dispose of the whole of his property, *Bennet* v. *Batchelor* (*a*), *Mence* v. *Mence*. (*b*)

Mr. *Hart* and Mr. *Roupel* for the executors; Mr. *Pemberton* for the representatives of the widow.

The residue is not only undisposed of, but the testator has expressed no intention to dispose of it, except in an event which has not occurred. The cases cited, therefore, are inapplicable, and the legal right of the executors must prevail.

The reply was stopped by the Court.

The MASTER of the ROLLS.

This will, however inaccurate, sufficiently discloses the testator's intention. Having a son by his first wife, and another living by his second, it was natural that he should provide for both branches of his own family in preference to more distant relations. The sister Mrs. *Pashley* and her children contend, that in the event of his leaving no children by his second wife who should attain twenty-one, the provision for his son by his first wife was to be devested; that is not a reasonable intention, and it is inferred upon the harsh construction, that he calculated on the portion which the son as one of the next of kin would take in the residue

(*a*) 3 *Bro. C. C.* 28. 1 *Ves. jun.* 63. (*b*) 18 *Ves.* 348.

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as a compensation. It is not to be believed that he meant to leave his son to this implied provision, under a clause so ambiguous as to raise a claim of title in the executors. The probability is that he would first make provision for his own children, and that the collateral branch was to take only in the event of their not living to enjoy it. Are not the words competent to effect that intention? They are clearly sufficient to embrace all his children. "The survivor of my children." The son of the second wife having died under twenty-one, the Plaintiff sustains the character of survivor. I think, though the intention is not accurately expressed, that the testator meant to speak of his family by his second wife as a class of claimants, by distinction from the issue of his first wife; and that the term survivor refers to a survivorship between those two classes. Contemplating the death of his eldest son on the one hand, and a failure of issue by his second wife on the other, he designed that the family which survived, should succeed to the fund originally provided for the family which failed; and a doubt might have arisen in the event of a plurality of children by the second wife, and one surviving. It is difficult to maintain that the words "my children" in the clause of survivorship, refer to objects different from those denoted by the same words in the succeeding clause; and it is impossible to doubt that in that branch of the contingency, he meant to include all his children, his eldest son as well as the offspring of his second wife. "Should not either of my children attain twenty-one or live to possess what is here bequeathed to them." It is true the former expression is not correctly applicable to the eldest son, who was not to take till he attained twenty-four; but the succeeding express bequest of the 3000*l.* given to him proves conclusively that the testator was then disposing of funds, and referring to events, in which he was interested; and the latter alternative phrase seems intended to advert to the clause postponing payment to him till the age of twenty-four. By the words "my children," then, he must be under-

understood to include all his children, and the eldest son is therefore, within the terms of the clause, the survivor. By that construction a meaning is given to the whole will; the intention of the testator was, having bequeathed legacies to each class of his descendants, that the survivor should take the whole, in preference to collaterals. That intention is natural; the terms of the clause are sufficient to express it, and I find nothing contradictory in the context. I am of opinion, therefore, that in the actual event, the surviving son is entitled to the residue bequeathed in the first instance to the other branch, as well as to the sum expressly given to him.

"Declare that the Plaintiff is entitled to the 3000*l.* reduced annuities standing in the name of the said testator; and the Defendants *Thomas Smith* and *James Williamson* by their answer admitting assets, his Honor doth order and decree that they do transfer the said 3000*l.* reduced annuities to the Plaintiff, and doth declare that in the events which have happened, the Plaintiff became, on the death of *Betsey* the widow of the testator, entitled to the residue of the testator's personal estate." Reg. Lib. A. 1817. fol. 817.

GITTINS v. STEELE.

March 3.

On refunding sums paid under an erroneous construction of a will, a legatee entitled to other funds making interest in the hands of the Court, is to be charged with interest; not a legatee who has no further concern in the estate.

IN preparing the minutes of the decree on the appeal in this case (*a*), a question arose whether in refunding so much of the legacy of 7000*l.* as had been paid out of the

(*a*) Reported, *ante*, p. 24.

per-

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GITTINS v. STEELE.

personal estate, the legatees of that sum who were also residuary legatees, should be charged with interest.

Mr. *Bell*, Mr. *Owen*, Mr. *Horne*, and Mr. *Trower*, for different parties, opposed the charge of interest. The payment was made *bonâ fide*. Interest is never charged except on contract or breach of trust, not for mere delay of payment, *Walker* v. *Bayley*. (a)

Mr. *Wetherell* in support of the charge. The parties who have been prejudiced, are entitled to an indemnity from those who have profited, by the erroneous payment; and the Court is enabled to satisfy their just claims, from the residuary fund in its possession, a portion of which is the property of the overpaid legatees.

The LORD CHANCELLOR.

Where the fund out of which the legacy ought to have been paid is in the hands of the Court making interest, unquestionably interest is due. If a legacy has been erroneously paid to a legatee who has no farther property in the estate, in recalling that payment I apprehend that the rule of the Court is not to charge interest; but if the legatee is entitled to another fund making interest in the hands of the Court, justice must be done out of his share.

The order directed payment of interest at the rate of 4 *per cent.* Reg: Lib. A. 1817. fol. 1689.

(a) 2 *Bos.& Pull.* 219. *ante*, *Bell* v. *Free*, p. 90.

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MOHUN v. MOHUN.

ROLLS.
March 6.

Testamentary papers in this form: — "I leave and bequeath to all my grandchildren, and share and share alike;" and "further, I appoint *T. H.* and *T. E.* my trustees for all my grandchildren and nieces;" are void for uncertainty, and pass no interest in the real estate.

Persons nominated trustees by an instrument which, being void, passes no trust fund, not allowed costs, as between solicitor and client.

JOHN MOHUN being possessed of real and personal estates, made his will, signed with his mark, and attested by three witnesses, in the following words: — "I "*John Mohun* of the town of *Cornforth*, do make this my "last will and testament. I leave and bequeath to all my "grandchildren, and share and share alike. As witness my " and seal this 14th day of *April* 1814." On the same day, the testator made the following codicil without date, but attested by three witnesses: — "And farther "I appoint *Thomas Haswell* and *Thomas Eggleston* my "trustees for all my grandchildren and nieces; as witness "my hand."

On the day following the date of the will, the testator died leaving nine grandchildren; and administration of his personal estate was granted, with the will and codicil annexed.

The bill filed by some of the grandchildren, alleging that the effect of the will and codicil was to devise and bequeath all the testator's real and personal estates in trust for his grandchildren, in equal shares, charged that the testator intended to leave all his estates to his grandchildren, and that he so directed his will to be made; but that the person who wrote the will, by mistake or accident, transposed the words "all to," and wrote "to all my "grandchildren," instead of "all to my grandchildren." The bill prayed that the will and codicil might be established, and the rights of the parties ascertained; an account of rents and profits, and a receiver.

Thomas Eggleston, who wrote the will, deposed that the testator

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testator directed him "to make the grandchildren all alike;" that after he had written the will, in which he had inserted the words grand-nephews and nieces, he read it to the testator, who remarked "that is wrong; it is grandchildren;" upon which the witness altered the words grand-nephews and nieces to grandchildren, and again read the will to the testator, who said "that will do;" that the witness afterwards recollecting that all the grandchildren were infants, suggested the propriety of appointing trustees; and at the testator's request drew the codicil, naming *Haswell* and himself for that purpose.

Mr. *Bell* and Mr. *Mascall* for the plaintiffs; Mr. *Roupel* and Mr. *Harrison* for the other grandchildren; and Mr. *Dowdeswell* for the nieces.

The question is whether the testamentary intention, which indisputably existed in the testator, is sufficiently expressed by these instruments. The words "leave and bequeath" are designed as an exercise of the testator's power of devise and bequest; and, being unaccompanied by terms of restriction, they operate on all that was the subject of that power, — his whole property, real and personal. The mere appointment of executors, passes a testator's property; and the appointment of trustees, whose duty would be analogous to the office of executors, must be equivalent. The legal estate devolves to them, the beneficial interest being, by the combined operation of the two instruments, in the grandchildren and nieces. The whole difficulty is removed by the transposition of the word "all," which, in its present situation, is without effect, the term grandchildren necessarily including all who correspond to that description. The clause, "I leave and bequeath all to my grandchildren," becomes then an explicit declaration of the testator's intention; and the codicil extends the bequest to the nieces.

Mr. *Agar* for the heir at law.

The Court cannot insert or transpose words for the pur-

pose of disinheriting the heir; and the ecclesiastical court has decided that the trustees are not executors.

The MASTER *of the* ROLLS.

This instrument presents ambiguity of every kind, uncertainty both in the subject and in the objects of the bequest; who are to take, and what is to be taken. The Court cannot insert or transpose words for the purpose of giving a meaning to instruments which have none.—The Bill must be dismissed (*a*).

It was then suggested that the trustees should receive costs as between solicitor and client.

The MASTER *of the* ROLLS.

Where the Court finds both a will and a fund, it avails itself of the fund to relieve the difficulties created by the will; but here is no will; nothing that can affect the real estate. Were there a fund in the hands of the trustees they would be entitled to the costs as proposed, but they are trustees of a nullity.

Bill dismissed, with costs as against the heir at law personal representative, and trustees.

(*a*) It may be doubted whether even after the transposition suggested the instruments would amount to a valid devise; in a case where a man seised of lands which by custom were devisable by parol, made a parol will in these words, " I give all to my mother, all to my mother:" the Court held that the word " all" was uncertain, and not sufficient to disinherit an heir, and that the lands did not pass by the will. *Bowman* v. *Milbanks*, 1 *Lev.* 130. 1 *Siderf.* 191. 1 *Keb.* 719. 1 *Eq. Ca. Ab.* 207. pl. 1. Some questions remotely analogous to the present, in which the principles of the civil law admitted a different conclusion, may be found in *Dig.* lib. 28. tit. 5. l. 1, 2.

1818.

March 5.

FIELD v. BEAUMONT & Ux.

An action having been commenced in 1816, the Plaintiff in *July* 1817, obtained a verdict, and a new trial having been ordered on 21st *January*, 1818, on the 9th *February*, the Defendant at law filed a bill for the production of documents, which he had given notice to the Plaintiff to produce on the trial, but which were not then produced, the commission day at the assizes, being the 7th of *March*, a motion on the 3d *March*, to extend the common injunction to stay trial, refused.

BY deeds of lease and release dated the 30th of *July*, 1790, Sir *Tho. Blackett* granted to *John Jarratt*, *Richard Hird*, and others in fee, all the coal mines in *Cold Harbour* Farm, and also "in the several lands or grounds then in the several tenures or occupations of widow *Kellett* and son, *Abraham Walker*," and other persons named, tenants of his estate at *Wibsey*.

At the date of the release, none of the farms were in the occupation of persons corresponding to the description of the widow *Kellett* and son, but one had been held by a family of the name of *Kellett* since 1742, and was then in the possession of *Joshua Kellett*, the son of a widow *Kellett*, who had occupied it jointly with the brother of her husband, till her death in 1788.

In 1808 the grantees caused pits to be sunk, and a steam engine to be erected, on the farm so occupied, and proceeding to obtain coal, continued to work the mines without interruption till 1816, when the Defendants, devisees of Sir *Thomas Blackett*, commenced an action of trespass against the Plaintiff, the agent of the grantees, in respect of such mining. Previously to the trial of the action, the Plaintiff gave notice to the Defendants to produce certain documents, tending to prove that the farm in question passed by the description of lands in the occupation of the widow *Kellet* and son, but they were not produced, and the Defendants obtained a verdict. On the 23d of *January* last, the Court of King's Bench, in consequence of the rejection at the trial of evidence tendered by the Plaintiff, ordered a new trial (*a*), which was expected

(*a*) *Beaumont* and wife v. *Field*, 1 *Barn.* and *Ald.* 247.

to

to take place at the ensuing *York* assizes, the commission-day being the 7th of *March*.

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FIELD *v.* BEAUMONT.

The bill filed on the 9th of *February* last, stating these facts, and that the farm in question was described, in the rent-books and other documents relating to the estate of Sir *Thomas Blackett*, as in the occupation of widow *Kellett*; and charging that the Defendants had in their custody or power, divers deeds, leases, rent-books, and other documents, by which it would appear that they ought not to maintain their action against the Plaintiff, prayed an account and production of such deeds, &c. and an injunction.

The common injunction having been obtained for want of answer, the Plaintiff on the 28th of *February*, moved before the Vice-Chancellor, that it might be extended to stay trial, and his Honor having refused the order (*a*), the motion was now made before the Lord Chancellor.

Mr. *Bell*, Mr. *Heald*, and Mr. *Buck* in support of the motion.

The question is, whether the Court will not, on the trial of a right, secure to parties applying in conformity to its rules, the production of evidence necessary to a just decision? The importance of these documents is obvious; to ascertain the tenants of particular lands at a given time, the proper evidence is the steward's books. Is it consistent with justice that the Defendants, profiting by their refusal to produce the documents, which cannot be withheld without a violation of the moral duty of a landlord towards his tenant, shall compel us to a trial of the question with imperfect proof?

No delay is imputable to the Plaintiff. Before the first trial, he had no reason to apprehend that the Defendants

(*a*) *Field* v. *Beaumont* & Ux, 3 *Madd.* 102.

would

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would refuse to assist the justice of the case by the production of the evidence which he required. After the verdict it would have been vain to proceed in this Court for compelling the production, till the court of law had granted a new trial; *Whitmore* v. *Thornton* (a). "Where there is no "trial to be had, there can be no discovery to be sought; "and if a verdict had passed simpliciter without more, a "bill then filed for a discovery might be demurred to, "for there could be no discovery, any more than as to a "matter not at issue." (b) The rule for a new trial was not made absolute till the 21st of *January*, and on the 9th of *February* the bill is filed. Even if delay had been practised, the Court would grant the order on terms. No evil can ensue from the postponement of the trial till the next assizes.

The application to extend the injunction to stay trial, is always successful, unless opposed by special circumstances, and the affidavit in support of the motion may be filed so late as the previous day. *Jones* v. —— (c)

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Wingfield*, against the motion.

After the delay practised by the Plaintiff, the Court will not afford the extraordinary aid solicited. — In *July* 1817, notice was given for the production of these documents; the Plaintiff therefore, insisting on them as material, must admit that he was at that time at least (how much earlier appears not), apprized of their materiality: but he has since taken no means to obtain them; nor is it even proved that at the trial they were called for by his counsel. Can he now on an application, within a few days of the assizes (d), be permitted to postpone the second trial, upon the sole ground of the want of this evidence? The Court would hesitate to grant that indulgence, even had the Plaintiff

(a) 3 *Price*, 231. (b) *Per Richards, Baron*, p. 248. (c) 8 *Ves.* 46.
(d) See *Blacoe* v. *Wilkinson*, 13 *Ves.* 454.

recently

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recently obtained a knowledge of the existence of these papers; but after a delay of nearly two years must, without hesitation, refuse it.

It is not easy to understand how these documents can be material: at least, the circumstances which they are stated to prove must, if true, be capable of other proof; and no necessity can arise for the admission of this evidence, in order to the attainment of the justice of the case.

The authority cited (*a*), refers only to the common affidavit, that the party believes the discovery to be material, and is not applicable to affidavits of special circumstances.

The LORD CHANCELLOR.

As I understand this case, in the year 1790, a grant was made of coal mines under different farms described in the deed; and among the rest, of mines, under a farm described as in the occupation of the widow *Kellett* and son. The question, what are the mines under lands so occupied, is a mere question of fact, and may undoubtedly be decided by evidence *dehors* the deed. It is said, that before 1790, the widow *Kellett* and her son occupied the lands to the minerals under which this contested claim is made, occupying them by virtue of one demise, and on payment of one entire rent; and that fact is alleged to be material to establish the right for which the Plaintiff contends. This at least is clear, that the Grantees, whose agent the Plaintiff is, had actually worked the mines on these premises from 1808 till 1816, when the action of trespass was commenced; and that that action, not commenced till then, was not brought to trial till 1817. On the effect of these

(*a*) *Jones* v. 8 *Ves.* 46.

circumstances

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Injunction granted in cases of trespass.

The Court will not, by injunction, restrain the working of mines, permitted during eight years, without directing an action.

circumstances of time, it was for the Jury to decide; but it has been very correctly stated at the Bar, that if the Defendants had filed a bill to stay the working of these mines, this Court, now in the habit of granting injunctions in cases of trespass (a) as well as of waste, must have refused an injunction to parties who had permitted these operations to proceed from 1808 till 1816 without interruption. To stop the working of a coal mine is a serious injury; and the expenditure incurred in the course of eight years, would raise an equitable ground to prevent the hasty interference of the Court. The Defendants would have been directed first to bring an action, and to return when the result of the trial had enabled the Court better to deal with the application. In 1817, they proceed to trial; and clear as it is that this discovery is extremely material, the Plaintiff, instead of adopting from the beginning the usual mode of compelling a discovery here, gives notice to the Plaintiffs at law to produce the rent rolls, and other documents: but the construction of the affidavits, though critically correct, is strained, by which they are understood as amounting to a statement, that the production was not required at the trial. It is true, that the fact might probably be established to a certain extent by the evidence of witnesses, for many persons must be still living who knew the nature of the occupation of these premises; and yet it may be equally true, that no other explanation or testimony would be as satisfactory as the evidence in the possession of the landlord. No bill for a discovery, however, was filed: and while it must have been known that the notice to produce the documents was nugatory, in the event of non-production at the trial, unless the Plaintiff was prepared with parol evidence of their contents, no attempt was made to give such evidence; nor did the

(a) See 19 *Ves.* 146. 147. *Grey* v. *The Duke of Northumberland*, 17 *Ves.* 281., and the cases there cited.

Plaintiff

Plaintiff obtain a *subpœna duces tecum*, which, according to the present determinations at law, it would not be discreet to disobey; for though the party may in Court object to produce the documents, yet, if the objection is over-ruled, the Court will compel the production. (*a*)

Under a *subpœna duces tecum*, the party may, in Court, object to produce the documents; but if the objection is overruled, production will be compelled.

If the Defendants had come to this Court immediately after the trial, stating that the impediment which previously existed was removed, by the verdict they had obtained, and praying an injunction against repeated trespass, it may be worth their consideration, whether, if it had been satisfactorily established that they would not at the trial make a production necessary to the fairness of the decision, this Court would have granted an injunction. It is another question what I am to do with the present bill. On the motion for a new trial, I cannot think that the Court of King's Bench would be influenced by the production or non-production of the documents; they would have said only that other measures should have been adopted to enforce production; but on the ground that the Judge rejected evidence which he ought to have received and laid before the jury, that Court granted a new trial. Now without referring to the case in the Exchequer (*b*), I entertain no doubt that after the trial, with proper and apt charges, a bill might have been filed in this Court to compel the production of these documents, to which a demurrer would not have been allowed. That proposition in no degree impeaches the judgment of the Court of Exchequer, that a bill stating only that a verdict has passed against the Plaintiff, and praying a discovery, without imputing a violation of the duties arising from the relation between the parties, could not be sustained. I do not mean to dispute that doctrine; but considering the mutual obligations of landlord and tenant, this is a different case,

After a verdict at law, a bill, with proper charges, may be sustained for the discovery of documents necessary to a fair decision.

(*a*) *Amey* v. *Long*, 9 *East*, 473.
(*b*) *Whitmore* v. *Thornton*, 3 *Price*, 231.

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and a bill might have been sustained in this Court for relief and for discovery. Then it is said, that pending the application for a new trial no one could have advised the Defendant at law to file a bill. Now, in my opinion, the attempt to obtain a new trial, after being foiled in compelling the production of these documents which he believed to be necessary evidence, was a reason for filing a bill; and I think there was negligence in this respect, though I am far from imputing blame to any one. The Court of King's Bench, from the state of their business, did not give judgment on the motion for a new trial till the 21st of *January*, and during all that time no bill for a discovery was filed. Having obtained the judgment of that Court, the Defendant at law then files the bill, and within a few days of the trial makes this application. My opinion is that the Vice Chancellor was right. In strictness, I cannot stay the trial because the Defendants withhold this evidence; but it will be for them to consider, whether, should they, refusing the production, obtain another verdict, and then apply here for an injunction against future trespasses, it may not be a subject of discussion in this Court, what is to be the effect of a verdict in a mere action of trespass, on an equitable right, after such length of possession.

Whether after a verdict at law, in an action of trespass, the Court will grant an injunction against future trespasses, in favor of parties who refused at the trial to produce documents necessary to a fair decision, *quære*.

Motion refused with costs, the Defendants undertaking to produce the documents on oath at the trial. — Reg. Lib. A. 1817. fol. 593.

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GOLDSMID *v.* GOLDSMID.

Rolls.
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G. having by marriage articles covenanted that if he died in the life of his wife, his executors should within three months after his decease pay to her 3000*l.*, and having by his will given all his property to his executors, in trust, after payment of his debts, at the expiration of three years from his decease, to divide it "in such ways, shares, and proportions as to them shall appear right," on his death during the life of his wife, the executors having died or renounced, his property is divisible according to the statute of distribution, and the widow's distributive share exceeding 3000*l.* is a performance of the covenant in the marriage articles.

BY articles of agreement dated the 28th of *March* 1791, executed in contemplation of marriage with the Defendant *Martha Goldsmid*, (which was afterwards solemnized,) *Abraham Goldsmid* the younger covenanted, that in case he should die in her life, his executors or administrators should, within three calendar months next after his decease, pay to *Martha Goldsmid*, her executors, &c. the sum of 3000*l.*

On the 9th of *July* 1812, *Abraham Goldsmid* died, leaving his wife surviving. His will, dated the 23d of *July*, 1800, was in the following words: — "I desire all my debts to be "paid, and as to my worldly estate of all kinds, I dispose "thereof as follows: Having the highest opinion of the "honor and discretion of my executors hereinafter named, "and satisfied that they will to the utmost exert themselves "for the benefit of my family, I nominate and appoint my "good relations and friends, that is to say, my father "*George Goldsmid*, *Daniel Eliason*, *Benjamin Goldsmid*, "and *Abraham Goldsmid*, joint executors of this my will, "and guardians of my minor children; and I give to my "said executors all my estate and effects, of what nature, "kind, or quality soever, to hold to them and the survivors "of them, in trust, and to and for the several ends, intents, "and purposes following; that is to say, as it is my wish "not to withdraw my capital for three years after my "decease, I desire my executors will not do so, but "during that space, take out and apply only so much as "they shall deem necessary to defray the expenses of "my funeral, pay my debts, and give to charities, which I "hereby authorize them to do to any extent they may "think

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" think right, and also what may be deemed by them " necessary for the support of my wife and family; and " from and immediately after the expiration of three years, " upon trust to divide my property of all kinds, in such " ways, shares, and proportions as to them shall appear right; " and I declare my mind and will to be, that if any of my " family shall dispute such division, and bring any action " or suit against my executors and trustees, or any of them, " then and in such case my mind and will is, that such " parties shall forfeit and lose all right and title to any " part of my estate and effects, and shall be for ever ex- " cluded therefrom; and I declare my mind to be, that my " executors and trustees may leave any matter in dispute " concerning my estate and effects, if any shall be, to " arbitration in the common and usual way."

Benjamin and *Abraham Goldsmid* having died in the life of the testator, and *Eliason* declining to act, *George Goldsmid* alone proved the will, but never undertook the discretionary trusts; on his death in *December*, 1812, *Eliason* renouncing probate, administration with the will annexed was granted to *Martha Goldsmid* the widow of the testator, and the Plaintiff *John Goldsmid* his eldest son.

The bill, filed by the children of the testator against his widow, prayed a declaration, that under the circumstances his personal estate ought to be distributed in a course of administration, as if he had died intestate, and that the Defendant was not entitled to the sum of 3000*l.* by virtue of the marriage articles, as a debt out of the testator's personal estate, and also to a distributive share of his personal estate, in case it should amount to more than 3000*l.*

Mr. *Bell* and Mr. *Perkins* for the Plaintiffs.

In consequence of the death of three of the executors, and the renunciation of the fourth, no persons remaining to whom the testator had confided the discretionary distribution of his property, that trust cannot be executed.

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The distribution of his estate, therefore, having become impracticable in the manner prescribed, must be made under the statute. (*a*)

Assuming the fact of an intestacy, the question is, whether the Defendant is entitled to the sum of 3000*l.* secured by the marriage articles, in addition to her distributive share? Upon the principle of decided cases, that share is a satisfaction of the covenant. *Blandy* v. *Widmore* (*b*), *Lee* v. *D'Aranda* (*c*), *Garthshore* v. *Chalie.* (*d*) In the latter case, after a review of all the authorities, the two former decisions are declared to be unshaken. (*e*) The rule is, that if, on a division of the covenantor's property at his decease under the statute of distribution, a portion equal in amount to the stipulated sum devolves to the party claiming by the covenant, that is a satisfaction, or more properly a performance, of the covenant. (*f*) The substance of the agreement is, that a given sum shall be paid to his wife after his death; if she receives that sum, the covenant is performed. Nor is it material whether the benefit accrues by the want of a will, or by the failure of a bequest, as on the death of a legatee in the life of the testator.

The conclusion, which is clear, therefore, considering this as a case of virtual intestacy, follows equally from the manifest design of the will, that whatever benefit might accrue to the wife under the discretionary authority confided to the executors, should be a satisfaction of the covenant. The express direction is, that any of his family who shall dispute the division made by the executors, shall forfeit all right to any part of his estate. If then the executors had given to the Defendant 5000*l.*, without declaring

(*a*) 22 and 23 *Car.* 2. *c.* 10. (*b*) 1 *P. Wms.* 324. 2 *Vern.* 709.
(*c*) 1 *Ves.* 1. S. C. under the name of *Lee* v. *Cox*, 3 *Atk.* 419.
(*d*) 10 *Ves.* 1. (*e*) P. 14.
(*f*) For the distinction between performance and satisfaction, and its consequences, see Mr. *Cox*'s note to *Blandy* v. *Widmore.*

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it to be in satisfaction of the covenant, she could not have claimed the 3000*l*. That claim disturbing the arrangement of the executors, would have subjected her to the forfeiture denounced by the testator. Under the will, therefore, she could not take both sums; and no argument can be thence deduced to exclude, in this instance, the application of the rule which prevails in all cases of intestacy.

Mr. *Hart* and Mr. *Parker* for the Defendant.

The cases cited are not analogous to the present. In them the question arose on an intestacy, here it arises on a will. The distinction is recognized in *Haynes* v. *Mico* (*a*); and the principle of that decision must prevail in this instance. There a husband who, before his marriage, had executed a bond for securing to his wife, in the event of her surviving him, 300*l*. payable in a month after his decease, having bequeathed to her 500*l*. payable in six months after his decease, Lord *Thurlow* held the widow entitled to both sums. Had the husband died intestate, the widow's distributive share, exceeding 300*l*., would, on the authority of the cases cited, have been a satisfaction of the sum secured by the bond; but the Lord Chancellor proceeded on the distinction between an intestacy and a will.

The Court cannot overlook the will and consider the testator as having died intestate; but must execute the discretionary trusts confided by him to his executors, which, by unforeseen events, can no longer be performed by them. Upon that instrument the intention is clear. The will authorizes the trustees to withdraw from his trade so much of the testator's capital as was necessary for the payment of his debts; and the discretionary distribution of the residue is not to be effected till the expiration of three years. At the death of the testator, the sum of 3000*l*. was a debt

(*a*) 1 *Bro. C. C.* 129.

due

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due to the Defendant; the Court cannot suppose the testator ignorant that it was a debt: by the express provisions of the will, therefore, it must be defrayed before the discretionary distribution commences. The testator could not intend that precarious unknown share, which in their discretion the trustees might, at the end of three years, apportion to the widow, as a satisfaction for a present debt. The Plaintiff's case is grounded entirely on the assumption of an intestacy. Here is neither intestacy nor *quasi* intestacy. The will vests the property in the executors, but the trust being joint, and therefore incapable of execution by the survivors, now devolves upon the Court, which in such cases always removes the uncertainty by resorting to the statute as the rule of distribution. *Green* v. *Howard.* (*a*) The direction that the capital shall remain in the trade during three years, is imperative on the Court as well as the executors; distribution cannot be made till the expiration of that period; in the mean time the Defendant is entitled to payment of the 3000*l.* as a debt. When the period of distribution arrives, the Court will not impute the payment of that debt as the receipt of a portion of the residue.

Mr. *Bell* in reply.

The existence of a will which events have rendered inoperative cannot prevent intestacy.

Even conceding that the sum of 3000*l.* is a debt, and that the widow claims under the will, what prevents the application of the rule, that a debt is satisfied by a legacy of an equal or greater amount? A direction for the payment of debts is clearly not sufficient. The instances in which the Court has established an exception to that doctrine proceed on the peculiar nature of the debt; as in

(*a*) 1 *Bro. C. C.* 31.

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Chancey's case (*a*), and *Richardson* v. *Greese* (*b*), where the debt consisted of wages, a growing and in part future claim.

But the true view of this case is as a case of intestacy; and then the authorities cited are conclusive.

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The bill is filed by the six children of *Abraham Goldsmid* the younger, against his widow *Martha Goldsmid*, co-administratrix of his effects with his eldest son; and the object of the suit is to obtain a decree, first, that the personal estate of *Abraham Goldsmid* shall be administered as in case of intestacy; secondly, that *Martha Goldsmid*, taking her distributive share under the statute, is excluded from all right to the 3000*l.* secured to her by the marriage articles. The single question is, Whether, on the comparison of the marriage articles and the will, the widow is entitled to both the provision which, by the former, the husband covenanted to make in her favor, and her distributive share of the personal estate? or whether the latter is to be considered either performance or satisfaction of the covenant? It is not disputed, but distinctly admitted by the Defendant, that in the actual event, the statute of distribution is the rule and guide for dividing the personal estate, the discretionary distribution intended by the testator having, under the circumstances, become impracticable, and no trusts existing which can be sustained or carried into execution. The first object of the bill therefore is matter of course; distribution by the executors not having taken place, and being now impossible, the personal property, though given to the executors, must be distributed by the only rule that can be resorted to for that purpose, the statute of distribution. The question, therefore, is, assuming the fact that the amount of the widow's distributive share

(*a*) 1 *P. Wms.* 408.
(*b*) 3 *Atk.* 65.; and see *Wallace* v. *Pomfret*, 11 *Ves.* 542.

exceeds

exceeds 3000*l.* whether she is entitled first to that sum as a debt under the articles, and then to her proportion of the remaining assets; or whether her distributive share of the whole personal estate is either a performance or satisfaction of the covenant contained in the articles?

In the examination of this question, the Court is not at liberty to proceed as if it were entirely open. Considering the nature of the claim to the provision under the articles on the one hand, and the distributive share under the statute on the other; the first derived under a contract, a specialty debt, payable in preference to all legacies, and even simple contract debts; the latter, a right to receive the residue after payment of debts, derived, not from the husband, but from the law distributing the estate, and, as Lord *Hardwicke* observes, making a will for him who has made none for himself: Considerable doubt might have been entertained whether, of two claims in their nature so distinct, the satisfaction of one could be considered a satisfaction of the other. But the Court cannot now so discuss a question which for more than a century has been at rest. The rule is clearly this: that the distributive share of the widow, in the case of absolute intestacy, is considered as performance of a covenant by which the husband had undertaken that she should receive a fixed sum at his death, provided that her share is equal to that sum. I state that the question is at rest; because I consider that rule conclusively established by the case of *Blandy* v. *Widmore* (*a*), in which the judgment of Sir *John Trevor* was affirmed, and on a rehearing, re-affirmed, by Lord *Cowper*. More than a century has since elapsed, and the subject has been frequently under the review of the most distinguished judges, of Lord *Hardwicke*, Lord *Thurlow*, Lord *Alvanley*, and the present Lord Chancellor; and I am warranted by the expressions of his Lordship in *Garthshore* v. *Chalie* (*b*),

(*a*) 1 *P. Wms.* 324. 2 *Vern.* 709.
(*b*) 10 *Ves.* 1.

when

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when I say that that case is unshaken. The rule was recognized by Lord *Hardwicke* in *Lee* v. *D'Aranda* (a), and again in *Barrett* v. *Beckford* (b); and though the subsequent authorities of *Haynes* v. *Mico* (c), and *Devese* v. *Pontet* (d), have decided that, in the case of testacy, what was given should not operate as performance or satisfaction of what was due, those decisions, grounded on particular circumstances, are so far from impeaching the rule, that they expressly recognise it. The only question now is, Whether a distinction can be made in the present case, the widow taking her distributive share under not an absolute, but a *quasi*, intestacy; where the purpose of the testator being disappointed, a virtual intestacy ensues, and the statute is the guide of distribution.

The principle of the decisions is most clearly explained in the able review of them by the Lord Chancellor in the last case on the subject. Admitting that it would originally have been extremely difficult to answer the argument of Serjeant *Hooper*, in *Blandy* v. *Widmore*, Lord *Eldon* says, — "Those cases are distinct authorities, that "where a husband covenants to leave, or to pay at his "death, a sum of money to a person who, independent of "that engagement, by the relation between them, and the "provision of the law attaching upon it, will take a pro- "vision, the covenant is to be construed with reference to "that." (e) Considering the contract as made with that reference, it must be interpreted as intended to regulate what the widow is to receive; and, consequently, when the event of intestacy ensues, the single question is, Does she not obtain that for which she contracted? If the object of the covenant is, that the executors of the husband shall pay to the widow a given sum, and in her character of widow, created by the same marriage contract, she in fact obtains

(a) 1 *Ves.* 1. 3 *Atk.* 419. (b) 1 *Ves.* 519. (c) 1 *Bro. C. C.* 129.
(d) *Pre. in Cha.* ed. *Finch*, p. 240. n. 1 *Cox*, 188.
(e) 10 *Ves.* 13.

from

from the executor or administrator that sum, the Court is bound to consider that as a payment under the covenant. These are not cases of an ordinary debt: during the life of the husband, there is no breach of the covenant, no debt: the covenant is to pay after his death; and the inquiry is, not whether the payment of the distributive share is satisfaction, but, a question perfectly distinct, whether it is performance. An important distinction exists between satisfaction and performance. Satisfaction supposes intention; it is something different from the subject of the contract, and substituted for it; and the question always arises, Was the thing done intended as a substitute for the thing covenanted? a question entirely of intent: but with reference to performance, the question is, Has that identical act which the party contracted to do been done? What sum was the widow to receive; and when? If she has received the sum stipulated, and at the time stipulated, namely, on the death of her husband, from his assets, the contract is performed. That is the principle of the cases of *Blandy* v. *Widmore*, and the rest of that class.

Distinction between satisfaction and performance.

The cases of *Haynes* v. *Mico*, and *Devese* v. *Pontet*, it is not necessary to examine critically: they range under a different principle. The question there was, What was to be the effect, not of intestacy, but of testacy. The proceeding in the former seems somewhat extraordinary.— Lord *Thurlow* first delivered an opinion strongly recognizing the whole doctrine established in the case of intestacy, and applying it to the case of testacy; distinguishing between a covenant and a debt, and stating the question to be of performance, not of satisfaction. We have certainly not a very correct account of what passed on a future day; for without answering his own reasons, he is represented as placing the case on a different ground, assimilating the claim to an ordinary debt, and considering it as a question of satisfaction. That was not the view which the former authorities required. The question was, Whether the

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the testator had performed his contract that the widow should receive at his death 3000*l*. In *Devese* v. *Pontet*, Lord *Kenyon* proceeds on the ground of satisfaction, not of performance. On that case, it is sufficient to observe, with Lord *Eldon*, that the covenant was entire, and could not be satisfied by the provision in the will; because, under the covenant, the birth of issue would reduce the wife's interest to a life estate. In *Garthshore* v. *Chalie*, the whole doctrine was investigated to its origin, and the principles on which it rests ascertained — principles such as I have stated. In cases of this description, construing the covenant with reference to the nature of it, and to that which alone gives to the widow any title, the contract of marriage, the question must always be, Is the covenant performed?

Assuming this to be the clear doctrine of the Court, does any distinction exist between the present case and those by which that doctrine is established? Does not the widow take the same interest, from the same source? — her interest under the statute, as in those cases, precisely the same share, and in her character of widow, arising from the marriage contract? So far the cases are identical: she takes, not through the testator's intent, but through the operation of law; for though the testator has not died intestate, but intended distribution by the discretion of his executors, yet that course being now impracticable, the rule of distribution is the same as in case of intestacy. She takes, therefore, not by virtue of the testator's intention: he designed and contemplated a very different division of his property. It is quite unnecessary to consider whether the executors could have bargained with the widow for the relinquishment of her claim under the marriage articles, before they assigned to her any share, or could have taken into their consideration the amount. The question now has no reference to intention. The widow takes through the medium, not of the will alone, but principally of the

statute

statute — that is the source and measure of her right, regulating the interest of herself and her children.

Considering, therefore, the question of performance of the contract, on what principle can it be contended that the share taken under a *quasi* intestacy is not a performance, which the same share taken under absolute intestacy indisputably is? In this case, as well as in the other, the widow takes *pleno jure*, herself being administratrix, and precisely the same sum. Every rule and principle established in the former cases applies equally when the widow, in that character, receives a proportion of the assets, by operation of law, exceeding the amount which she was entitled to receive under her marriage contract. To determine that this is not a performance of the contract, when in the case of absolute intestacy I should be bound to determine it to be performance, would be to proceed on those nice distinctions so strongly reprobated by Lord *Eldon* (*a*) and Lord *Hardwicke* (*b*); and which, to adopt the expression of the latter, "would never stand with the reason of mankind." — In substance, the widow obtains all for which she contracted; and I am therefore bound to say that she is entitled to her distributive share, but not in addition to her provision under the marriage contract.

I desire to be understood as not intending to impeach the authority of *Haynes* v. *Mico*, and *Devese* v. *Pontet* — I say only, that those cases are not applicable to the present. They were cases of testacy, and the question arose on the effect of legacies given by the will to the widow, which *prima facie* importing bounty, admitted a presumption of an intention in the testator to augment the provision in the settlement, and not to satisfy or perform it. No such considerations apply to intestacy. (*c*)

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(*a*) 10 *Ves.* 12—15. (*b*) 3 *Atk.* 422.

(*c*) The following are some of the principal cases on the question, Whether a benefit accruing under the intestacy or will of the covenanter

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"His Honor doth declare, That the personal property "of *Abraham Goldsmid* in question in this cause ought to "be distributed as if he had died intestate; and the De- "fendant, *Martha Goldsmid*, by her answer admitting that "her distributive share of the said testator's personal estate "and effects is larger than the sum of 3000*l.*, by her said "marriage articles covenanted to be paid to her by her said "late husband in the event of her surviving him, His Honor "doth order and decree, That the said Defendant do take "her distributive share of the personal estate of the said "late *Abraham Goldsmid*; but the same is to be in satisfac- "tion of the said covenant contained in the said articles "made on the marriage of the said Defendant with the "said late *Abraham Goldsmid*, deceased." — Reg. Lib. A. 1817. Fol. 807.

is a performance or satisfaction of a covenant for securing a sum of money at his death? — In *Corus* v. *Farmer*, 2 *Eq. Ca. Abr.* 34.; *Blandy* v. *Widmore*, 1 *P. Wms.* 324. 1 *Vern.* 709.; *Lee* v. *D'Aranda*, 3 *Atk.* 419. 1 *Ves.* 1.; *Wilcocks* v. *Wilcocks*, 2 *Vern.* 558.; *Herne* v. *Herne*, 2 *Vern.* 555.; *Rickman* v. *Morgan*, 1 *Bro. C. C.* 63., 2 *Bro. C. C.* 394.; *Garthshore* v. *Chalie*, 10 *Ves.* 1.; *Bengough* v. *Walker*, 15 *Ves.* 507.: — such a benefit was held to be a performance or satisfaction of the covenant; and see *Lechmere* v. *Earl of Carlisle*, 3 *P. Wms.* 411., *Ca. Temp. Talb.* 80.; *Sowden* v. *Sowden*, 1 *Bro. C. C.* 582., 1 *Cox*, 165.; *Bellasis* v. *Uthwatt*, 1 *Atk.* 426., ed. *Saund.*; *Weyland* v. *Weyland*, 2 *Atk.* 632.; *Wilson* v. *Pigott*, 2 *Ves. Jun.* 356.; *Sparkes* v. *Cator*, 3 *Ves.* 530. In *Haynes* v. *Mico*, 1 *Bro. C. C.* 129.; *Kirkman* v. *Kirkman*, 2 *Bro. C. C.* 95.; *Jeacock* v. *Falkener*, 1 *Bro. C. C.* 295.; *Devese* v. *Pontet*, 1 *Cox*, 188., *Pre. in Cha.* ed. *Finch*, 240. *n.*; *Broughton* v. *Errington*, 7 *Bro. P. C.* 12.; *Eastwood* v. *Vinke*, 2 *P. Wms.* 613.; *Couch* v. *Stratton*, 4 *Ves.* 391.: such a benefit was held to be neither performance nor satisfaction of the covenant. And see *Barrett* v. *Beckford*, 1 *Ves.* 520.; *Prime* v. *Stebbing*, 2 *Ves.* 409.; *Richardson* v. *Elphinstone*, 2 *Ves. Jun.* 463.; *Twisden* v. *Twisden*, 9 *Ves.* 413.

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Specific performance refused of an agreement to grant a lease for a term expired before the hearing of the cause, the acts of waste committed during the possession of the premises not entitling the plaintiff, in an action on the covenants to be inserted in the lease, to more than nominal damages.

THE bill filed on the 30th of *July*, 1814, stated an agreement of *February* preceding, for granting a lease by the Plaintiff to the Defendant, of a house and land at *Norwood*, for a term of three years from the 1st of *May* in that year, with an option to the Defendant to hold the premises two years longer. The Defendant took possession under the agreement, but refused to accept a lease or execute a counter-part. The bill alleging that the Defendant had cut down ornamental timber on the premises, prayed a specific performance of the agreement, an account of the timber cut, and an injunction.

The Defendant by his answer, admitting that he objected to some clauses contained in the draft sent to his agent, offered to accept a lease, and denied cutting down timber, except about 80 poles, which were used in the repair of the fences.

The value of the poles cut was estimated by the witnesses at about 3*l*.

Mr. *Bell* and Mr. *Shadwell* for the Plaintiff.

Although the term is expired before the hearing of the cause, we are entitled to a specific performance of the agreement, in order that upon a lease executed with proper covenants to be settled by the Master, we may at law recover damages for waste committed in breach of them. It is clear that the Defendant was bound to execute a lease with proper covenants: it is equally clear that those covenants have been violated; and the question is, Whether, because the cause could not, in the regular course of proceeding,

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be brought to a hearing before the expiration of the term, the Court will deny to the Plaintiff a relief, without which he can have no opportunity of obtaining justice. It is an established practice to direct the Master to settle leases, for the sole purpose of enabling the parties to recover damages at law. The doctrine, that a person taking possession of an estate under an agreement for a lease, and committing acts of waste, cannot be made the object of a decree, provided that he sufficiently protracts the proceedings, and postpones the hearing till the term is expired, would, by a singular exception to the equitable principle, that time is not of the essence of a contract, authorize the perpetration of enormous mischief with impunity.

Sir *Samuel Romilly*, and Mr. *Heald*, for the Defendant.

The relief prayed is without precedent. How can the Court direct the execution of a lease for a term already expired — a lease which must on the face of it appear to be dated after the expiration of the term? But the question is no longer open to argument. In a recent case, the late Master of the Rolls advanced a cause instituted for the specific performance of an agreement to accept a lease, in order that the hearing might take place before the expiration of the term (*a*); and in the case of *Weston* v. *Pimm*, precisely similar to the present, His Honor dismissed the bill. The relief if obtained would be nugatory. The Plaintiff has not shown that she is entitled to a covenant on which she could recover at law. The charge in the bill of felling ornamental timber is not substantiated by the answer or evidence.

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This seems not a case for the interference of a court of equity; but before I give judgment I will look into the evidence.

(*a*) *Hoyle* v. *Livesey*, 1 *Mer.* 381.

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The bill was filed, before the term expired, for a specific performance of the agreement to accept a lease, and if the case rested there, the Plaintiff would be entitled to a reference to the Master; but, without fault on either side, before the hearing, the term is expired, and the question arises, what course is to be pursued when the hearing has been thus postponed till after the expiration of the term, in a case in which specific performance would otherwise have been decreed? This question is said to have come before the late Master of the Rolls in *Weston* v. *Pimm.* (a) I have seen the pleadings in that case, and the circumstances are so exactly similar to the present

(a) In that case the bill stated a memorandum of agreement dated 10th *October*, 1809, by which the Plaintiff agreed to let, and the Defendant to take, certain farms for the term of 5, 7, or 9 years from *Michaelmas* preceding, determinable at the end of the first or second term, on 12 months' previous notice by either party, the tenant to keep and leave the premises and buildings of every description in good repair, "they being first put into that state;" and prayed a specific performance. The answer admitted the agreement, possession taken under it, and tender and refusal of a lease; but stated that at the date of the agreement, the buildings and fences were very much out of repair, that the Plaintiff had since repaired only one farm-house, that repeated applications had been made to him by the Defendant or his agents, (particularly one by letter of 16th *January*, 1812,) apprizing him of the state of the premises, and requiring him to put them into good repair, which he had not done; and submitted that "the Plaintiff, "by having so long refused or neglected to perform his part of the said "agreement, by not first putting the said farms and premises into good "and sufficient repair, was not entitled to a specific performance of "the said agreement." It was admitted, that on the 17th *September*, 1813, the Plaintiff gave to the Defendant a written notice to quit on 29th *September*, 1814, being the end of the term of five years. On the question of repair the Defendant adduced evidence. The cause was argued at the Rolls on the 24th of *November*, 1815, by Sir *Samuel Romilly* and Mr. *Horne* for the Plaintiff, and Mr. *Hart* and Mr. *Newland* for the Defendant, when His Honor dismissed the bill without costs. *Reg. Lib. Min.* 24th *November*, 1814. The case is briefly reported under the name of *Western* v. *Perrin. 3 Ves. & Beam.* 197; where it is stated that the Master of the Rolls dismissed the bill, "on the ground that "the term to be granted by the lease was determined by the notice."

that

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Whether specific performance of an agreement to grant a lease will, in any case, be decreed after the expiration of the term, *quære*.

that I cannot distinguish them. It seems to have been there suggested that the lease ought to be antedated; the terms of the dismission are not stated, but in fact the Master of the Rolls dismissed the bill. It is not necessary, however, now to determine the general question, and I wish to be understood as not holding, that there cannot be a case in which it may be fitting for a court of equity to decree the execution of a lease, after the expiration of the term; a case of important rights and losses arising in the interval, and where a strong necessity is presented to the Court.

Without deciding that question, I think that this is not a case of that description. On examining the facts, it seems that the only effect of a decree for specific performance, would be to encourage litigation. A decree is asked in order that an action may be brought for acts committed by the lessee while in possession; but if in any case a court of equity refuses its interference, on the principle of protecting a party from his own imprudence, and the ill advised prosecution of his claims, this is that case. By the evidence of the person who cut down the 70 or 80 poles in question, it appears that he had been previously employed by the Plaintiff to repair the premises; they were represented in the treaty for the lease to be in complete repair, and this witness proves that, with the exception of a fence, that statement was correct: the fence wanted repair, but instead of consulting the Plaintiff on the subject, the Defendant engaged this workman to cut down poles, amounting in value to about 3*l*., which were employed in the repair; an act certainly incautious and incorrect. As a tenant, the Defendant was wrong in felling growing trees, and undoubtedly a verdict would be obtained by the Plaintiff, but what damages would a jury give? None certainly sufficient to compensate the expenses of litigation. — Such being the only injury alleged, and such the sole object for which the Court is to direct

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the execution of the lease, in mercy to the Plaintiff, whatever might be done in a case of another description, I will not enable her to bring an action. The bill must be dismissed, but without costs; in strictness the rights of the Plaintiff were infringed.

April 13, 14.

The case was mentioned again on the subject of costs.

The MASTER *of the* ROLLS.

After reading all the pleadings and evidence, I have not discovered any reason to change my former opinion. The pressure of business in Court having delayed the hearing till the lease was expired, the Plaintiff, without any default on her part, is prevented from obtaining a decision on the merits. Without determining whether a case might arise in which the Court, for the purpose of investing the party with a legal right to satisfaction for the breach of covenants which the lease was to contain, would not decree a specific performance after the expiration of the term, I was of opinion that this case did not contain sufficient for that purpose; but the principal subject on which expense has been incurred by the examination of witnesses, is the act of the Defendant in cutting down trees to repair fences, without a lease, or permission from his landlord. It is evident that the lease would have contained no clause to authorise that act; even if the landlord were bound to supply timber for repairs, still it is his right to point out what shall be taken for that purpose. The Defendant is clearly not entitled to costs.

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On a motion to dissolve a special injunction staying the trial of an action till further order, the Master, on a reference for impertinence, having reported the answer impertinent in a small part only, and the Plaintiffs having excepted to the report, and insisting on their right, after the question of impertinence was decided, to except to the answer for insufficiency, the Lord *Chancellor* examined the bill and answer, and dissolved the injunction, so far as it extended to stay trial.

RAPHAEL *v.* BIRDWOOD.

A SPECIAL injunction having been obtained by the Plaintiffs, after the answer had been filed, restraining the Defendants from proceeding to trial in certain actions commenced by them "till the further order of the Court," (a) against the Defendants' motion to dissolve the injunction, the Plaintiffs showed a reference for impertinence. — The Master having reported a small part of the answer impertinent, the Plaintiffs excepted to the report. In this state of the cause the Defendants moved to dissolve the injunction, so far at least as it restrained the trial at the ensuing assizes.

The *Solicitor-General*, Mr. *Wetherel*, and Mr. *Rose*, in support of the motion.

This injunction, granted after answer, restrains the proceedings, not in the common form "till answer or farther order," but "till farther order" only, and is therefore not continued of course till the answer has been proved perfect. To such an injunction the ordinary rules of practice are inapplicable. The Court, in the exercise of that discretion which by the terms of the order it in effect reserved, will now remove the obstacle to our proceeding at law, and permit the trial at the ensuing assizes.

The Plaintiffs, treating this as a common injunction, insist on the exception to the Master's report as an insuperable objection to the motion. — The rule for which they contend is unreasonable. On the reference of the answer for impertinence, the Master reports it impertinent, not in the greater part, as the Plaintiffs contend, but to the extent

(a) Reported 3 *Mer.* 229.

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of some few folios only: they except to his report; if dissatisfied with Your Lordship's decision, what is to prevent their resort to the ultimate court of appeal? A final judgment being at length pronounced, they claim to be entitled to except to the answer for insufficiency, and to pursue the same ruinous course of successive appeals upon interlocutory proceedings; and during this whole period the injunction, as they contend, remains indissoluble. By this suspension of the progress of the suit till the collateral issues, first of impertinence, and then of insufficiency, have been decided, an injunction becomes a most destructive instrument of delay. — The Court can never, abandoning all control over its practice, permit abuses so destructive. According to decided cases, a reference for impertinence is no objection to a motion for dissolving an injunction (*a*); and that doctrine is highly reasonable. The Plaintiffs complain that we have answered too much.—*Nimium non nocet.*

We have offered to expunge the impertinent matter, and tendered costs. In the discussion before the Master, the Plaintiffs have admitted that their proposed exceptions for insufficiency apply to the schedule only: the body of the answer they acknowledge to be unexceptionable.

It is not competent to them to insist on the strict practice in support of an order obtained by the indulgence of the Court. To their motion for an injunction, the fact that the answer was filed afforded an objection as strong, as the exceptions to the report afford to the present.

The LORD CHANCELLOR.

Against the motion for dissolving the injunction on filing the answer, the Plaintiff may object, either a reference for impertinence, or exceptions for insufficiency, but he cannot object both at the same time. A reference for impertinence can never be contemporaneous with excep-

(*a*) *Milner* v. *Golding*, 2 *Dick.* 672.

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tions for insufficiency; for before the Court can examine the sufficiency of the answer, it must decide the question of impertinence. (a) On exceptions for insufficiency, the Master's report that the answer is sufficient, terminates the injunction, although the Court should afterwards be of opinion that the answer is insufficient. Is there any case in which it has been determined that on a reference for impertinence, the report is, or is not, decisive? I recollect no determination, and in the absence of authority, I should think that the Master's judgment, that the answer is not impertinent, must be conclusive with respect to the injunction, unless the Plaintiff, content with that judgment on the question of impertinence, insists that he is entitled to take exceptions for insufficiency.

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Pepys*, against the motion.

It might be sufficient for us to rely on the established practice. But in no case was there less pretence for the charge of studied delay on the part of the Plaintiffs. On the 7th of *May* the Defendants filed a demurrer, which, we are entitled to say, was frivolous — for it was overruled. That event was not unexpected to the Defendants, and on the same day their answer was filed. The Master reported the answer impertinent in certain particulars; we think it impertinent in others, and claim the judgment of the Court on that point. We think it also insufficient. But the Defendants assume a merit for the impertinence of the answer; they say that they have given more than we required. We ask the necessaries of life, and they give us the superfluities.

(a) "There must be a judgment on the reference for impertinence, before there can be a judgment upon the reference for insufficiency: the Court not knowing what the answer is, until the question of impertinence has been disposed of." *Goodinge* v. *Woodhams*, 14 *Ves.* 536. *Lacy* v. *Hornby*, 2 *Ves.* & *Beam.* 293. The reference for impertinence is waved by a subsequent reference for insufficiency. *Pellew* v. —— 6 *Ves.* 456.

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In order to exclude the suggestion of delay, we are willing to file exceptions for insufficiency immediately.

The LORD CHANCELLOR.

On both sides it seems to be taken for granted, that a Plaintiff who has obtained an injunction, may, on the filing of the answer, first have a reference for impertinence; and if the Master reports the answer impertinent, though in six lines, may then, having the report in his favor, refuse to expunge those six lines, may except to the report for not stating that much more is impertinent, may next except to the answer for insufficiency; and may, during all these proceedings, delay the trial of the action at law. On what authority is that stated? Certainly the practice that a reference for impertinence stays the motion to dissolve the injunction is modern. (*a*) I think it right (*b*); but the difficulty has always been, a difficulty on which I know no decision, what is to be done in such a case as the present? The Plaintiff is required to procure the Master's report in four days; but a report that the answer is sufficient destroys the injunction. (*c*) Is that the effect here? The Plaintiff can expunge the impertinence; the Defendant cannot. I recollect not a single determination on a case circumstanced like this.

(*a*) See *Milner* v. *Golding*, 2 *Dick.* 672. *Goodinge* v. *Woodhams*, 14 *Ves.* 534.

(*b*) *Hurst* v. *Thomas*, 2 *Anstr.* 591. *Fisher* v. *Bailey*, 12 *Ves.* 18. *Lacy* v. *Hornby*, 2 *Ves. & Beam.* 291; and a motion to refer the answer for impertinence has been allowed as cause against dissolving an injunction, upon the terms of procuring the report in a week, *Goodinge* v. *Woodhams*, 14 *Ves.* 531.

(*c*) The meaning of the Plaintiff's "undertaking to procure the Master's report in four days, must be considered to be that he will procure the Master's report of the *insufficiency of the Defendant's answer* within that time, otherwise it would merely furnish the Plaintiff with farther means of delay, and there would be exceptions to the Master's report, upon every reference of an answer to an injunction bill." (*Botham* v. *Clark*, 2 *Cox* 429.)

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If the Master's opinion that the answer is sufficient is a competent document for the Court to act on at all hazards, should not the report as to impertinence be effectual at least to compel the Plaintiff to take his exceptions for insufficiency immediately? The question is, Whether the Master's report of insufficiency is every thing, and of impertinence nothing? Doubts have existed, therefore, whether the Plaintiff should not, on the one hand, have an opportunity to except for insufficiency, and, on the other, if the Master reports the answer not impertinent, be required to take his exceptions immediately. My present opinion is, that the Master's judgment on the question of impertinence must, at least without reference to the inquiry whether there is farther impertinence, be taken, in injunction cases, to have the same weight as his judgment with regard to sufficiency or insufficiency; and as with regard to sufficiency his report terminates the injunction, although the Court afterwards differs from him (a), his report on impertinence, without reference to the question whether there is farther impertinence, must impose on the Plaintiff an obligation to except for insufficiency immediately. I have a recollection that on consideration of the question, whether the party can refer for impertinence and insufficiency at the same time, a difficulty of this sort arose, but I recollect not in what way the Court disposed of it. — Certainly Lord *Kenyon*'s opi-

In injunction cases, the Master's report on the question of impertinence must, at least without reference to the inquiry whether there is farther impertinence, have the same weight as his report on the question of insufficiency.

(a) *Botham* v. *Clark*, 2 *Cox*, 429. *Vipan* v. *Mortlock*, 2 *Mer.* 479. *Scott* v. *Mackintosh*, 1 *Ves. & Beam.* 503. The dissolution of the injunction being the consequence of the Master's report, without motion. *Hutchinson* v. *Markham*, 2 *Madd.* 355. But where the answer has been referred for impertinence on the day for showing cause against dissolving the injunction, and the impertinence has been expunged, and exceptions to the Master's report disallowing exceptions to the answer over-ruled, the injunction may be dissolved on motion, in the first instance, without an order *nisi* (*Lacy* v. *Hornby*, 2 *Ves. & Beam.* 291.), but is not, as it seems, dissolved *ipso facto* by the Master's report of the sufficiency of the answer; the reference for impertinence "putting an "end to all application to dissolve the injunction." (2 *Ves. & Beam.* 295.)

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nion was, that a Plaintiff is not entitled to complain of having too much; but it is obvious that an answer may be impertinent in nine-tenths, and insufficient in the remaining tenth. Another difficulty occurs from the course of the Court in directing the references to different Masters, of whom one may report impertinent the very passage, from the want of which another reports the answer insufficient. That must be remedied.

The Plaintiffs having specified the points to which they intend to except for insufficiency, perhaps the best course will be for you to submit by consent to the opinion of the Court, whether the answer is sufficient in those points.

The LORD CHANCELLOR.

March 10.

References of answers for impertinence, more numerous within the last two years than in all my former experience, have become a subject of complaint in the Master's office, and a scandalous abuse of the rules of practice. On the filing of the answer, the Plaintiff refers it for impertinence; in regular course the report must be obtained within a certain number of days, but practisers are so absurd as not to insist on that rule; if the Master reports the answer not impertinent, the Plaintiff excepts to the report, and the Court having disposed of that question, there follows a reference for insufficiency; the party taking care not to obtain a reference to the same Master who reported on the impertinence, and who would at once understand the matter, but industriously selecting for the motion a day when the reference will be made to another Master. The Bar will learn with satisfaction that I have this morning made an order of Court for the correction of that abuse. (*a*) It is at present impossible for me to say, whether this case affords

(*a*) See the order *ante*, p. 128.

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an instance of the sort of practice to which I allude. Without at all prejudging that question, I wish it to be understood, that it is a practice which I am determined to suppress. I shall follow the example of Lord *Hardwicke*, and myself examine the bill and answer.

March 11.

On this day the Lord *Chancellor* dissolved the injunction so far as it restrained trial.

ROLLS. *March* 6.

GREENE v. WIGLESWORTH.

A testator having, by his will, devised his freehold and copyhold estates in trust for his son in strict settlement, with remainder to his nephew; and having given, by his first codicil, a special power of sale over a part of his estates, to be exercised at the request of his son, in favor of his nephew; and, by his second codicil, a general power of sale over "all or any part of his estates," to be exercised at the discretion of his trustees; the conveyance by the trustees must contain both the particular and the general power of sale.

THOMAS GREENE, by his will, dated the 3d of *September* 1796, devised his freehold estates within *Cockerham* and *Skerton*, in the county of *Lancaster*, and his copyhold estates within the manor of *Slyne* with *Hest* (subject to a term of 60 years, for securing an annuity of 1000*l*. to his widow during her life), to *Henry Wiglesworth*, *Robert Bradley*, and *George Tennant*, and their heirs, upon trust, to convey to the use of his son *Thomas* for life, on attaining 21, without impeachment of waste; remainder to the same trustees to preserve contingent remainders; remainder to the issue of *Thomas* in strict settlement; remainder to the testator's second and other sons successively, and the heirs male of their bodies; remainder to the

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daughters of the testator, as tenants in common in tail; remainder to his sister *Margaret Bradley* for life, without impeachment of waste; remainder to his nephew *Robert Greene Bradley* for life, without impeachment of waste; with like remainders to trustees, and to his issue, as in the previous limitation to the testator's son, with remainders over.

By a codicil dated the 23d of *August* 1799, the testator, after reciting the devise in his will for the term of 60 years, and that the lands at *Cockerham* and *Skerton* were an ample security for the annuity to his wife, revoked the devise as to the copyhold estates within *Slyne* and *Hest*, and substituted some estates purchased since the date of the will; and, after devising all his freehold estates at *Cockerham*, and all his copyhold estates within the manor of *Slyne* with *Hest*, to *H. Wiglesworth*, *R. Bradley*, and *G. Tennant*, and their heirs, upon the trusts in the will mentioned, proceeded as follows: — " Whereas my son *Thomas*, having had the mis-" fortune to be born in *London*, may perhaps prefer some " other part of the kingdom to *Lancashire*, which I do not " wish; and it may so happen that it may be convenient " to my nephew *Robert Greene Bradley* to purchase my " estate at *Slyne*, and being desirous that the same may be " held and enjoyed by one of my worthy father's descend-" ants, I therefore order and direct that a proper clause " should be inserted in the conveyance in tail directed by " my will, to enable the trustees therein to be named, and " for a valuable consideration, at the request of my said " son, to grant, surrender, or convey, all or any part of " my estate at *Slyne*, unto the said *R. G. Bradley* and his " heirs, freed and discharged from the said entails, on his " the said *R. G. Bradley*'s agreeing to assume the name of " *Greene* instead of *Bradley*;" and the testator directed the money arising from such sale to be laid out in the purchase of other estates.

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On the 22d of *April* 1809, the testator published a second codicil, which, after some alterations in his will and codicil, and a confirmation and republication of them so altered, contained these words: — "I do hereby further "declare and direct, that the settlement by my said will, "directed to be made as therein mentioned, shall contain "the usual and common powers to the trustees, with the "consent of the tenants for life in possession, and of the "guardians of tenants in tail in possession, during the "minority of such tenants in tail, to sell and exchange all "or any part of the lands and hereditaments devised by "my said will, and directed to be purchased and settled as "therein mentioned, and for laying out the money arising "by such sales, or for equality of exchange, in the purchase "of freehold, copyhold, or customary lands or heredita- "ments, to be settled to, upon, and under, the subsisting "uses, trusts, and powers of my said will; and also "clauses for giving receipts, and for appointing new trus- "tees, and clauses of indemnity, and all such other usual "and reasonable clauses and provisions, as by counsel in "the law shall be advised and approved; and I hereby "ratify and confirm my said will and codicil so altered as "aforesaid."

The testator died on the 6th of *December*, 1810, leaving *Thomas Greene* his only child and heir at law, his sister *Margaret Bradley*, and her son *Robert Greene Bradley*. The bill filed on the 29th of *April* 1815, by *Thomas Greene* the testator's son, against the trustees, *Martha Greene* the widow of the testator, and his sister, and her son, stating the will and codicils, and that the Plaintiff attained the age of 21 years on the 19th of *January* 1815; and alleging that the trustees refused to make a proper settlement and conveyance of the devised premises, by reason of doubts which had arisen on the construction of the will and codicils, and on the extent of the power of sale or exchange relative to the copyhold estate at *Slyne* to be inserted therein; prayed,

prayed a declaration that there should be inserted in the settlement a power of selling and exchanging all the estates devised, and all others since purchased upon the same trust, including the estate at *Slyne*; that the trustees might make such settlement accordingly; and that the Plaintiff might be let into possession of the estates as the first tenant for life.

On the hearing, the Court directed a reference to the Master to approve a settlement.

The Master reported that it was the intention of the testator, that there should be inserted in the settlement the usual powers to the trustees, with the consent of the tenants for life in possession, and of the guardians of tenants in tail in possession, (during the minority of such tenants in tail,) to sell and exchange all or any part of the lands and hereditaments devised by the will and the first codicil, to the Defendants the trustees, and the lands and hereditaments directed to be purchased and settled therewith, with the exception of the testator's estate at *Slyne*, to which the Master was of opinion that the general powers of sale and exchange should not extend; but that a special power ought to be inserted in the settlement enabling the trustees, at the request of the Plaintiff, and for a valuable consideration, to sell and convey the estate at *Slyne* to the Defendant, *R. G. Bradley* and his heirs, on the condition in the first codicil mentioned.

To this report the Plaintiff excepted, insisting that the Master ought to have reported that the estate at *Slyne* was subject to the general power of sale.

Sir *Arthur Pigott* and Mr. *Pepys* for the exception.

The limited power of sale in the first codicil, seems an extraor[illegible]rangement for accomplishing the wish which th[illegible] that the property at *Slyne* should be

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be enjoyed by one of his father's descendants; a purpose better secured by the strict limitations of the will, than by a clause enabling the nephew to acquire an absolute estate. If understood to confer on the nephew a right of preemption, that provision probably presents the first instance of such a right, without an ascertained price. But whatever might be its design or effect, it is abrogated by the second codicil. The renewed confirmation of the will and first codicil with which that instrument concludes, can refer only to the power of sale introduced since the first confirmation. The power of sale given by the second codicil must indisputably be either a revocation of the former limited power, or supplemental to it. The opinion of the Master is consistent with neither supposition. He considers the estate at *Slyne* withdrawn by the first power from the operation of the second. What authority has the Court to restrain the meaning of the terms, "all or any part?" To construe them as excluding some part? The attempt to qualify an unambiguous clause by reference to a codicil ten years earlier, is preposterous: Supposing them inconsistent, the last must prevail.

The true construction is, that the general power supersedes the limited. Considerable difficulties may occur if both powers are inserted in the settlement. Must the estate at *Slyne* be offered to *Bradley* before it can be sold to others? By what means is the price to be ascertained? If *Bradley* refuses to purchase at the price proposed, may it afterwards be sold for less? His rights under the particular, will render nugatory the general, power. No man will purchase subject to be embarrassed by his claims.

Mr. *Bell* and Mr. *Roupell* for *R. G. Bradley*.

The testator intended that both powers of sale should subsist; the first to give to *Bradley* a right of preemption, the last to enable the trustees to sell, in the event of his refusal to become the purchaser. On this construction

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these clauses are evidently consistent, and wherever the different parts of a will can be reconciled, effect must be given to the whole. The difficulties suggested are imaginary. A valuation of the estate may be made, and a price fixed, at which if *Bradley* refuses to purchase, it may be sold to others.

Mr. *Romilly* for the trustees.

It was the wish of the testator that some of the descendants of his father should reside on the estate at *Slyne*, his patrimonial estate, which had continued in the family upwards of two centuries; confiding in the local attachment of his nephew, he authorises the trustees (with the consent of his son) to convey the estate to him; but as a pledge of the existence of that local attachment, he requires payment of a valuable consideration, and the assumption of the family name. The peculiar form of the special power is calculated to execute this peculiar intention; a direction for inserting usual and common powers of sale, is not a sufficient evidence of an intention to revoke so special a provision. — A mere right of preemption, which would cease with the life of *Bradley*, is not an adequate security; on his death the estate would, on that construction, become subject to the general power of sale.

The principle is, that a clause declaratory of a particular intent, with reference to a particular subject, shall not be controlled by subsequent general words which, if applied to that particular subject, are inconsistent with the declared intent. *Adams* v. *Clarke.* (*a*) *Nevil* v. *Broughton.* (*b*) *Popham* v. *Bamfield* (*c*), and other cases of that class.

The insertion of the word freehold in the second codicil, (all or any part of the *freehold* lands, &c.) would remove the whole difficulty, the first power applying only to copyhold.

(*a*) 9 *Mod.* 154. 2 *Eq. Ca. Ab.* 557. 561. (*b*) 1 *Rep. in Ch.* 77.
(*c*) 1 *P. Wms.* 54. *Salk.* 236.

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The MASTER *of the* ROLLS.

Whatever difficulties may attend the sale of the estate, the only question for the consideration of the Court is, what directions the testator has left? If the will and the two codicils can be reconciled, effect must be given to them. The fair inference from these instruments seems to be, that at one period, the testator intended to prescribe a special power of sale respecting the estate at *Slyne*, and that at a period ten years subsequent, his intention was to confer a general power of sale over all his estates, without exception. The question is, whether the last is to be the sole direction on the subject, or whether the two powers are so consistent that both may be inserted in the settlement? In a case so singular, I am not surprised by the difficulties which have occurred.

The testator has pursued a peculiar object, in a way that seems not well calculated for the attainment of it. Having a predilection for the copyhold estate, by his will he settled it, in common with freehold estates, in the strictest manner on his son, and his son's children, with remainder to his nephew; effectually securing the transmission of the estate through the line of posterity to whom he thought it desirable that it should descend. Under the will the son possessed no power to alien the estate, unless with the concurrence of a son who attained 21 in his life: it was natural to suppose, therefore, that if the testator wished to preserve this property in the family, he would leave the will untouched; far from this, however, by his first codicil he gives a power of sale, at the instance of that very son whom he supposes to want, in favor of the nephew whom he supposes to possess, the sentiment of regard for the property that existed in himself, under which the nephew might instantly acquire an absolute estate in fee; an arrangement exposing the estate to a hazard of passing into another family, and relying wholly on the local attachment of the nephew. Instead, however, of indulging in specu-

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lation and criticism on the intention of the testator, the Court must observe his expressions. By the first codicil he had separated the copyhold estate, declaring that it should not be included in the term for securing the annuity, but that his nephew should have a right to purchase it. Whatever difficulties might arise in executing such a power of sale, it is enough to say that the testator has given it; and had he made no other codicil, no obstacle of that sort would have prevented the Court from inserting in the settlement a power so qualified. The omission to name a price, and regulate the right of pre-emption, may create embarrassment, but that must be encountered; a sale effected under the power can be effected only in conformity to its provisions. Upon a reasonable construction this special power, whatever it is, must, supposing the first codicil unrevoked, be inserted in the settlement.

In the second codicil it appears that the testator had not forgotten the first; it must have lain before him, for he erases the names of two persons whom he appointed trustees, and expressly ratifies and confirms it. If he no longer intended a limited power over the *Slyne* estate, why did he not then annul that clause? The confirmation of the codicil unaltered in that respect raises a strong inference that he designed not to abrogate the limited power of sale. He then adds a general power, extending over the whole property. I feel it exceedingly difficult to insert the term freehold, or exclude one part when the testator uses the words "all or any part." The will clearly embraced freehold and copyhold. How can I suppose, in the absence of any such expression, that he meant this clause to be confined to freehold only? We cannot conjecture when the words contain no ambiguity, or interpolate when there is no mistake to be corrected by insertion. Sometimes the testator speaks of freehold, sometimes of copyhold, sometimes of real estates: here he says "all my estate." Can it be maintained that that phrase extends to part only

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of his estate? The usual power of sale, of which he directs the insertion in the settlement, comprehends the whole property, without regard to the holders of it, and is to be exercised at the discretion of the trustees. In what respect is that more extensive power inconsistent with a special power of sale over the *Slyne* estate only, to be exercised at the discretion of the son in favor of the nephew, and limited therefore to their lives; the motive for qualifying it being personal, the fear that the son had not the same local attachment as the nephew? There is not that incompatibility between the two provisions which should induce the Court to reject either. The difficulties afford no reason for rejection. If *Bradley* declines to purchase, the provision in his favor ends; he may retain a power of creating embarrassment; difficulties may arise during the lives of these two individuals, but the testator might intend these difficulties for the purpose of preventing an absolute sale, or of directing it into a particular channel.

On the construction of the three instruments, I think that the settlement should contain a general power over all the estates, and also a special power relative to the *Slyne* estate. The report must be confirmed, with a variation relative to this power of sale.

His Honor doth declare, that the provision in the first codicil to the said testator's will contained, whereby it was directed that a proper clause should be inserted in the conveyance in tail directed by the said will, to enable the trustees therein to be named for a valuable consideration, at the request of the said testator's son to grant, surrender, and convey, all or any part of his estate at *Slyne*, unto the said *R. G. Bradley*, freed and discharged from the said entails, on his the said *R. G. Bradley* agreeing to assume the name of *Greene* instead of *Bradley*; and that the money arising from such sale should be laid out in the purchase of freehold or copyhold lands in any part of *Great Britain*, according

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according to the direction of his said son, to be settled to the same uses as were by the said will directed respecting his said estate at *Slyne*, is, upon the true construction of the said codicil, to have effect only during the joint lives of the said *R. G. Bradley*, and of the son of the said testator; and His Honor doth also declare, that the provision in the second codicil to the said testator's will, whereby it was directed that the settlement by the said will directed to be made should contain the usual and common powers to the trustees, with the consent of the tenants for life in possession, and of the guardians of tenants in tail in possession, during the minority of such tenants in tail, to sell or exchange all or any part of the lands and hereditaments by the said will directed to be purchased and settled, as therein mentioned, and for laying out the money arising by such sale, or for equality of exchange in the purchase of freehold, copyhold, or customary lands or hereditaments, to be settled to, upon, or under the subsisting uses, trusts, and powers of the said will, is upon the true construction of the said first and second codicils thereto, to extend to, and to comprize, the said copyhold estate at *Slyne*, as well as the other estates devised by the said will, but subject, as to the said estate at *Slyne*, to the special power given with respect thereto by the said first codicil, &c.

Reg. Lib. A. 1817. fol. 1227.

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March 17.

The MAYOR and BURGESSES of KING'S LYNN v. PEMBERTON.

Persons authorised by act of Parliament to cut a canal, and required to appropriate certain sums for the construction and maintenance of works to protect a harbour in which the canal was intended to terminate, not restrained from cutting through their own lands, at a distance from the harbour, in the event of a present insufficiency of funds for the completion of the undertaking, pending an application to Parliament for farther powers to levy money.

THE bill filed by the "Mayor and burgesses of the borough of *Lenne Regis*, commonly called *King's Lynn*, "in the county of *Norfolk*, in behalf of themselves and all "other the persons who are or may be interested in the security and preservation of the town and harbour of *King's* "*Lynn*, and the navigation thence to the open sea," stated, that by act of Parliament 35 *Geo.* 3. *c.* 77., entitled, "An act "for improving the drainage of the middle and south levels, "part of the great level of the fens called *Bedford* level, "and the low lands adjoining or near to the said levels, "as also the lands adjoining or near to the river *Ouze*, in "the county of *Norfolk*, draining through the same to the "sea, by the harbour of *King's Lynn*, in the said county, "and for altering and improving the navigation of the said "river *Ouze*, from or near a place called *Eau Brink*, in the "parish of *Wiggenhall St. Mary*, in the said county, to "the said harbour of *King's Lynn*, and for improving and "preserving the navigation of the several rivers communicating with the said river *Ouze*," certain persons therein described were appointed commissioners for drainage, and certain other persons commissioners for navigation; and the commissioners for drainage were authorized and required to make a new river or cut, to branch out of the river *Ouze* at or near a place called *Eau Brink*, and to rejoin the present course of that river at or near the harbour of *King's Lynn*, for the free passage of the navigation, and of the waters of the river *Ouze*; and in order that those purposes might be effectually answered, and that the harbour of *King's Lynn* might not be prejudiced or rendered unsafe in consequence of such

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new river or cut, it was directed that the same should be made of the dimensions and on the plan therein particularly described; and the commissioners of drainage were authorized and directed to execute all such works as certain engineers named should agree upon, for the better security and more effectual preservation of the town and harbour of *King's Lynn*, and the navigation thence to the open sea, from all possible damage in consequence of the making the said intended new river; that after authorizing the sale of the bare sands and channel of the river between two dams which were to be constructed, the act directed the commissioners for drainage to retain in their hands, out of the money to arise from the sale, a fund sufficient to answer the expenses of the future maintenance and repair of the works, which was to be exclusively appropriated to defray the expense of such maintenance and repairs as might become necessary, after the works should have been finished; and that the act authorized the commissioners for drainage to levy a tax of 4*d.* an acre on all the lands described, to be applied to the purposes mentioned; and imposed certain tolls, during 10 years after the opening of the new river, on all goods passing thereon.

The bill farther stated, that by statute 36 *Geo.* 3. *c.* 33., the commissioners for drainage and navigation were authorised to direct the continuance of the rate of 4*d.* per acre during a farther period of five years; that by statute 45 *Geo.* 3. *c.* lxxii., the lands directed by the former acts to be taxed at the rate of 4*d.* per acre, were taxed at that rate for five years from the 24th of *June* 1805; and that by statute 56 *Geo.* 3. *c.* xxxviii., it was enacted, that all occupiers of the lands taxed under the former acts should pay the sums with which they were chargeable, together with a certain penalty thereon.

The bill farther stated, that the tax of 4*d.* per acre for the term of 15 years, (which expired on the 24th of *June* 1810,)

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1810,) if properly levied, would have produced the sum of 75,724*l.* and no more; and that the arrears of the tax yet unreceived amounted to 20,000*l.*; that none of the works proposed by the acts had been commenced until lately, and that the commissioners for drainage had already expended 60,000*l.*, and upwards, being considerably more than the sum actually received by them on account of the said tax, in the purchase of lands and other purposes provided by the acts preparatory to the commencement of the works; and that they had no funds in hand for entering on and proceeding therewith; but that on the contrary they were considerably in arrear in respect of the monies already expended by them, as appeared by a statement of their accounts from *August* 1809 to the 25th of *August* 1817, printed in behalf of the commissioners, and signed with the name of their treasurer, the Defendant, a copy of which was annexed by way of schedule to the bill.

The bill then stated, that an application had lately been made, and was then pending in Parliament, in behalf of the commissioners for drainage, for an act to enable them to levy a farther tax of one shilling per acre, for the term of five years, for the purpose of commencing and carrying on the works directed by the former acts, and that such tax would amount to the like sum of 75,724*l.* and no more; that by an estimate made in behalf of the commissioners for drainage, as a foundation for their application to Parliament, the expenses attending the making the said new navigable cut, and other expenses incident thereto, were statedt o amount to the sum of 84,000*l.*; in which estimate were not included the expenses of the several works which would become necessary for the security of the town and harbour of *King's Lynn*, and the navigation thence to the open sea; that the nature and extent of such works could not be ascertained till the navigable cut had been completed, and the effect of the tidal and other waters passing through

through the same, and confined therein, was known; but that, in the opinion of engineers of skill, the completion of them would require 150,000*l.* or 200,000*l.*

The bill farther stated, that the Mayor and burgesses of the borough of *King's Lynn* were incorporated by royal charter considerably above two centuries ago, and that they had ever since continued and still were a corporation by virtue thereof; and by letters patent granted to the predecessors of the Plaintiffs, the then Mayor and burgesses of the borough, by King *James* the First, the said Mayor and burgesses were constituted, and had ever since been and then were, admirals within the said borough, and the port, limits, and bounds thereof; and by virtue of such office and appointment, the Plaintiffs and their predecessors for the time being had ever since and still exercised all necessary powers and authorities for the conservation and security of the said harbour, and of the navigation thereof; that previous to the passing of the act 35 *Geo.* 3. *c.* 77., certain able and experienced engineers, whom the Plaintiffs consulted on that occasion, were of opinion that the opening of the said navigable cut would be attended with imminent hazard to the town and harbour of *Lynn*, and the navigation thereof, and that the hazard would probably increase with the increased operation of the waters of the said navigable cut, and the harbour be rendered inaccessible except to vessels of light burden; that the Plaintiffs, together with the owners of other adjacent lands, opposed the passing of the act, and obtained the introduction of the clause directing the construction of works for the more effectual preservation of the town and harbour; that the proposed tax of one shilling an acre for five years would not provide a fund sufficient for completing the navigable cut, and the works more immediately connected therewith; and that the proceedings in the works, so far only as the said fund would extend, would be attended with great and manifest detriment, and the most imminent danger, to the harbour and

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and the navigation thereof, as well as to the property and interests of the merchants of the town, and of a great number of the landholders of the adjoining districts; and that it would be necessary for the commissioners of drainage to renew their application to Parliament for an increase of the tax, or an extension of the period during which it was to be levied, as often as the funds should be exhausted, and inadequate to defray the current expenses of the works.

The bill charged, that in proceeding to obtain the intended act of parliament, the commissioners were guilty of a fraud on the public, and especially on the Plaintiffs, their application being grounded on a declaration and express understanding that the funds to be raised under the intended act would be fully sufficient to complete all the works provided for by the several acts; that since making the last-mentioned application to parliament, the commissioners had begun to dig in the ground purchased by them for the purpose of making the said navigable cut, and that several hundred workmen were then employed upon the same under their direction; that the said works, if continued under the circumstances aforesaid, would be to the great and irreparable loss and injury of the town and harbour of *Lynn*, and of the navigation thereof.

The bill, farther charging that the Defendant was many years ago duly appointed by the commissioners for drainage, and then was, the treasurer of the said commissioners; and that it was directed by the said acts, or some or one of them, that the commissioners should and might be sued by or in the name of their treasurer for the time being, or other officer, as therein mentioned, prayed a discovery, and injunction to restrain the Defendant as such treasurer, and the commissioners for drainage, their agents, &c., from making and digging, or continuing to make and dig, the said navigable cut, and from in any manner proceeding in the execution of the said several works, unless or until a proper

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proper and sufficient fund should have been raised or provided, and set apart for the purpose of making and completing all such works as should be necessary for the security and preservation of the town and harbour of *King's Lynn*, and the navigation thence to the open sea, from all possible damage or injury in consequence of the making the said navigable cut.

An affidavit having been filed, verifying the allegations of the bill, and stating estimates to show the insufficiency of the funds for the completion of the works, the Plaintiffs gave notice of a motion for an injunction.

Affidavits were filed in opposition to the motion, but not read. They stated, in substance, that with the strength of labor at present employed the works could not be finished, and the water diverted from its channel, within two years; nor could an additional strength be with safety employed for finishing them in less time; that the ground through which the work was then proceeding belonged to the commissioners of drainage, having been purchased by them for the purpose of making the cut; that until the ground at the ends of the cut was taken out, and the water of the river diverted from its present channel into the new river, no possible damage or injury could in any way happen to the town and harbour of *King's Lynn*, or to the navigation thence to the open sea; that the commissioners of drainage were in possession of about 14,000*l.* to proceed with the making of the new river; that the land and tolls which they would have as part of their fund would produce 40,000*l.*, and the tax to be levied under the intended act 75,000*l.*

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Merivale*, in support of the motion.

The commissioners have obtained the powers conferred on them by the act, under a representation that the sums which they were authorized to raise would be sufficient to

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complete the undertaking. That representation is falsified by the event. It is ascertained that their present fund is not adequate even to open the new navigable river, much less to construct the works necessary for the protection of the town and harbour of *Lynn*. Their application to Parliament proceeds on the acknowledgment of the insufficiency of their means. What may be the probable result of that application it is needless to inquire: for our purpose it is enough that they are not now in possession of competent funds. The question is, whether the Court will permit them, while they are destitute of the means of completing it, to proceed with an undertaking from the partial execution of which irreparable mischief may ensue.

The LORD CHANCELLOR.

Persons authorized by act of parliament to cut a canal, if their funds are insufficient for the completion of the undertaking, may, on the prompt application of the owner of lands through which they are cutting, be restrained from proceeding.

The circumstance of their not cutting through your lands distinguishes this case most materially from every other of the kind. In the case of *Agar* and the *Regent's Canal* Company, I acted on the principle, that where persons assume to satisfy the legislature that a certain sum is sufficient for the completion of a proposed undertaking, as a canal, and the event is that that sum is not nearly sufficient, if the owner of an estate through which the legislature has given to the speculators a right to carry the canal, can show that the persons so authorized are unable to complete their work, and is prompt in his application for relief grounded on that fact, this Court will not permit the farther prosecution of the undertaking. (*a*) So in another case, a Mr. *Taylor* filed his bill, stating that at the time of subscribing, he expected that when he had paid the whole of his instalments he should find the canal complete, but that with the present fund it would not pass to the east of *Hampstead*, and the Court thought him entitled to relief.

(*a*) *Agar* v. The *Regent's Canal* Company, 26th *January*, 1814, Injunction granted. Reg. Lib. A. 1813. fol. 476. 5th *March*, 1814, Injunction dissolved. Reg. Lib. A. 1813. fol. 1056. And see *Coop.* p. 77.

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I do not say that you cannot reach this case: that is to be discussed; but it is not the case of a proprietor through whose lands the commissioners are proceeding to conduct the canal. I must assume that Parliament will not give to them farther powers, without taking care that they have funds sufficient to complete the undertaking. The proper application seems to be to Parliament, by petition representing these circumstances.

For the motion.

Our application is that, in the meantime, they may be restrained from proceeding with an undertaking which, in the eventual deficiency of the fund, may be productive of irreparable injury.

The LORD CHANCELLOR.

What irreparable injury can ensue to the town and harbour of *Lynn*, from the act of the commissioners in cutting through their own lands? If they have not funds, and any proprietor complains that they are cutting through his lands, that is an equity which I understand; but unless irreparable mischief can be shown to arise from the very act, what right have I to restrain them from cutting through their own lands?

Mr. *Wetherell* and Mr. *Abercromby* against the motion.

Before mischief can possibly arise to the harbour of *Lynn*, the canal must be completed. The object is to direct the river through that course, and we are still two miles from the harbour. The peculiarity of this case is that the undertaking must be completed before the alleged injury can occur.

The LORD CHANCELLOR.

This case does not appear to me to turn on the same principle with those which have been mentioned. The commissioners are not cutting through the lands of others. If

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If the Plaintiffs show injury to their property, that is another ground.

Sir *Samuel Romilly*.

The ground of our application is, danger to the harbour of *Lynn*. It is true that what is now done cannot injure the harbour; but it occurred to us, that if we delayed till the danger approached, suffering the Defendants to expend large sums, the Court would tell us that we came too late. (*a*)

The LORD CHANCELLOR.

You have come very properly; but a peculiarity in this case is the pending application to Parliament; and the acts provide that the commissioners shall take measures for the security of the harbour of *Lynn*. Any person interested may petition either House of Parliament.

Motion refused.

March 31.

SMYTHE *v.* SMYTHE.

On a motion after the answer for an injunction to stay waste, affidavits filed subsequently to the answer cannot be read.

THE bill filed on the 9th of *February* stated, that the Defendant was tenant for life of certain estates, subject to impeachment of waste, during a term of 30 years; and after that period, without impeachment of waste; that the term having expired in *January* last, the Defendant marked and advertised for sale all the oak, ash, and elm trees (with few exceptions) on the estates; and charging that the trees afforded shelter and ornament, and were necessary to the pleasurable enjoyment of the estate, and were for that purpose planted and suffered to grow, prayed an injunction against felling any timber or trees, growing or planted

(*a*) See *Birmingham Canal Company* v. *Lloyd*, 18 *Ves.* 515.

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for the ornament of the mansion-house, or for ornament in the grounds and plantations, or saplings unfit to be cut.

The answer having been filed on the 26th of *February*, insisting on a right to cut timber, but denying the fact or intention of cutting ornamental trees, the Plaintiff on this day moved for an injunction to restrain the Defendant from cutting any timber or other trees unfit to be cut in a due and fair course of husbandry.

The *Solicitor General* and Mr. *Rose*, for the motion.

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Dowdeswell* for the Defendant.

The Plaintiff having in support of the motion offered affidavits subsequent to the answer, tending to prove the fact of equitable waste, the Defendant objected to their being read; insisting that although an injunction obtained on affidavits filed before the answer may be sustained on affidavits filed subsequently, an injunction cannot be originally granted on such affidavits.

The LORD CHANCELLOR.

I recollect no former case in which this question has arisen. The allegations in the bill are general: if the Plaintiff at once supports them by the statement of particular facts on affidavit, the Defendant possesses an opportunity of explaining or denying those facts in his answer; but if the Plaintiff reserves his affidavits till the answer is filed, he deals not altogether fairly with the Defendant, who is entitled before the answer to be apprized of the points on which the Plaintiff rests his case. I shall pause before I extend to cases, in which no previous injunction has been obtained, the rule of practice which authorizes the admission of affidavits for continuing an injunction to stay waste against the answer. Affidavits of acts of waste committed since

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since the filing of the bill are entitled to a distinct consideration.

April 1.

The LORD CHANCELLOR.

On diligent inquiry I find no instance in which the Court has permitted the Plaintiff to support a motion for an injunction, by affidavits filed after the answer. The Countess of *Strathmore* v. *Bowes* (*a*) is the most material case; but all the reasons there given for receiving the affidavits tendered are founded on the fact that the injunction had been originally granted on affidavit. The affidavits are inadmissible. (*b*)

Motion refused.

(*a*) 2 *Dick.* 673. 2 *Bro. C. C.* 88. 1 *Cox*, 263.

(*b*) So *Sommerville* v. *Buckler*, 3 *Anstr.* 658. The general rule is, that for the purpose of obtaining or continuing an injunction, affidavits cannot be read against the answer; (see *Clapham* v. *White*, 8 *Ves.* 35.) but the policy of preventing irreparable injury has introduced an exception to that rule in cases of waste, (*Gibbs* v. *Cole*, 3 *P. Wms.* 255. *Potter* v. *Chapman*, *Amb.* 99. *Robinson* v. *Byron*, 1 *Bro. C. C.* 588. *Countess of Strathmore* v. *Bowes*, 2 *Dick.* 673. 2 *Bro. C. C.* 88. 1 *Cox.* 263. *Norway* v. *Rowe*, 19 *Ves.* 153.) or of mischief analogous to waste, (*Peacock* v. *Peacock*, 16 *Ves.* 49. *Charlton* v. *Poulter*, 19 *Ves.* 148. n. *Norway* v. *Rowe*, 19 *Ves.* 144.) an exception not extending to questions of title, (*Norway* v. *Rowe*, *ubi supra*,) or to injunctions for restraining the negotiation of bills of exchange, (*Berkeley* v. *Brymer*, 9 *Ves.* 355.). From the present decision it may be collected that where no affidavits are filed prior to the answer, none filed subsequently can be read in contradiction to it; but they may be read in support of an allegation in the bill, not contradicted by the answer, *Taggart* v. *Hewlett*, 1 *Mer.* 499. *Morgan* v. *Goode*, 3 *Mer.* 10.; and see *Burroughs* v. *Oakley*, 1 *Mer.* 52. 376. n. *Bonner* v. *Johnston*, 1 *Mer.* 366. *Crutchley* v. *Jerningham*, 2 *Mer.* 505. During the discussion, the case of *Isaac* v. *Humpage* (3 *Bro. C. C.* 463. 1 *Ves.* 427.) was mentioned by the Lord Chancellor as of no authority; and see to the same effect *Hanson* v. *Gardiner*, 7 *Ves.* 308. *Berkeley* v. *Brymer*, 9 *Ves.* 356.

BURTON *v.* TODD.

TODD *v.* GEE.

Rolls. *March* 31.

On a bill by a purchaser for specific performance of a contract for the sale of an estate, a vendor who, during 15 years, had retained possession of the whole estate, and of one-third of the purchase money, was, under the circumstances, charged with interest on one-third of the rents and profits.

IN *August* 1802, *Mary Burton*, *Richard Gee*, and *Robert Osborne*, devisees in trust to sell, under the will of *Robert Burton* deceased, put up for sale by auction two estates called *Turner Hall* and *Ganstead*, described in the printed particulars of sale as containing 412 acres, of which 227 acres were tithe-free, paying a very trifling modus. One of the conditions of sale was, that the purchaser should make a deposit of 10 *per cent.* upon the purchase money, and sign an agreement to pay one-third on the 10th of *October* then next, one-third on the 5th of *January* 1803, and the remaining third on the 5th of *April* following, a good title having been made. At the sale, the agent of *William Todd* was declared the purchaser, at the price of 16,000*l.*; and a memorandum in writing was signed by him, and by the auctioneer, in behalf of the vendors. On the 11th of *October* 1802, *William Todd* paid to *Osborne* 5,333*l.* 6*s.* 8*d.*, the first instalment of the purchase money; and on the 23d of *October*, the farther sum of 430*l.*, being the whole of the purchase money for the close called *Ganstead*; but he was not admitted into possession of any part of the estates except that close. On the 17th of *March* 1803, an abstract of the vendor's title was, for the first time, delivered to the purchaser, who returned it early in *April*, with the observations of his counsel; and on the 30th of *May* a farther abstract was delivered, which still not showing a good title, after repeated applications by the purchaser's solicitor, on the 18th of *November* 1803, the solicitor of the vendors delivered a third abstract, but the title produced being unsatisfactory, objections were stated by the purchaser's counsel,

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counsel, which were not removed, nor the information required given.

In *May* 1804, the vendors filed a bill against *Todd* for specific performance of the agreement; and under a reference on motion, the Master reported that the vendors could not make a good title, the principal objections to the title arising from the refusal of the vendors to have an account taken of the money which they had received from such part of the testator's personal estate as by his will was made subject to his debts and legacies, and to purchase the tithes of such part of the estate sold as was described to be tithe-free. To this report the vendors excepted.

On the 19th of *October* 1808, the purchaser filed a bill against the vendors and other persons interested under the will of *Robert Burton*, praying that the vendors might specifically perform the agreement, and that all necessary accounts respecting the estate of the testator might be taken in order to make a good title; and if it should appear that the vendors could not make a good title, that an account might be taken of the sums of money paid by the Plaintiff in pursuance of the contract, and of the interest thereon, and of the injury which the Plaintiff had sustained by the non-performance of the contract; and that the vendors might be decreed to pay the amount to the Plaintiff.

In addition to the facts before stated, the bill alleged the will of *Robert Burton*, devising certain estates in the county of *York* to his wife *Mary Burton*, *Richard Gee*, and *Robert Osborne*, upon trust, to sell all or such parts as they should judge necessary and proper; and to apply the money in the first place in payment of the testator's debts; and to place out the surplus at interest for his wife, for life; and after her decease to pay his legacies (not expressly made payable out of personal estate) in exoneration of his personal

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estate; and to continue the surplus, if any, at interest, for the benefit of the person entitled to the residue of his real estate: and he devised all other his estates, and also such of his said estates as should not be disposed of by his trustees for the purpose before mentioned, to his wife for life, in satisfaction of all claims; and after her decease to *R. C. Burton* for life, and to his sons and daughters, in strict settlement; with a like remainder to *N. C. Burton*, and his issue; with remainder to the third and other sons of the mother of *R. C. Burton*, and *N. C. Burton*, with remainders over. And he declared, that in case the estates devised to his trustees should not be sufficient for payment of his debts, and such legacies as were directed to be raised by sale of such estates, then, and in such case only, he devised such part of his other estates as should be sufficient for the payment of his debts and legacies, to *Mary Burton*, *R. Gee*, and *R. Osborne*, their heirs and successors, upon the same trusts as the estates previously devised to them in trust to be sold; and he appointed his wife sole executrix.

The bill charged, that if the accounts of the testator's real and personal estates were taken, it would appear that the estate agreed to be sold to the Plaintiff, or some part thereof, was devised to *Mary Burton*, *Gee*, and *Osborne*, to be sold to pay the debts and legacies of the testator; and that by having the accounts taken, and purchasing from *C. A. Cooper* the tithes of that part of the estate stated to be tithe-free which he was willing to sell, and by other necessary acts, the vendors might make a good title to all, or the greater part of the estate.

To this bill the Defendants, *Gee* and *Osborne*, put in a demurrer and answer, demurring to the relief for want of equity, and admitting that a bill had been filed against the

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Plaintiff as stated; and that *Mary Burton* was dead. The demurrer was overruled. (*a*)

The answers of the Defendants concurred with the statement of the bill, except in assigning to the delivery of the first abstract the date of *January* instead of *March*, 1803; and of the second, the 18th of *September*, instead of the 18th of *November* following.

In *May*, 1809, the exception to the Master's Report in the first suit was overruled; after which, no farther proceedings were taken. On the hearing of the second suit in *December*, 1813, the decree directed a reference to the Master to make inquiries relative to such of the debts and legacies of *Robert Burton* the testator, as were by his will directed to be paid or raised by sale of his real estates specified, and relative to his real estates sold; and it was declared, that in case the Defendants *Gee* and *Osborne* could make a good title, the Plaintiff was entitled to have the agreement specifically performed; and it was ordered "that it be referred to the said Master to inquire and "state whether the said *R. Gee* and *R. Osborne* can make "or procure to be made to the said Plaintiff a good title to "the said hereditaments and premises, or to any and what "part thereof, pursuant to the particulars and conditions "of sale; and in case the said Master shall find that the "said *R. Gee* and *R. Osborne* cannot make to the said "Plaintiff a good title to any part of the estates, heredita-"ments, and premises, pursuant to the said particulars and "conditions of sale, the said Master is to state to the "Court specially in what respects, and by reason of what "circumstances, the said *R. Gee* and *R. Osborne* are not "able to make to the said Plaintiff a good title," &c. (*b*)

(*a*) *Todd* v. *Gee*, 17 *Ves.* 273.
(*b*) Lib. Reg. B. 1813, fol. 923.

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By his Report, dated the 6th of *December* 1816, the Master stated, that *Gee* and *Osborne* could make a good title to the estate sold, except that they had not shown that the 227 acres, or any other part of the estate, were tithe free, or subject only to a trifling modus.

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The cause coming on for farther directions, was argued by Mr. *Agar* and Mr. *Duckworth* for the Plaintiff; and by Mr. *Hart*, Mr. *Bell*, and Mr. *Barber*, for the Defendants.

The MASTER *of the* ROLLS.

The first of these suits was instituted in *May*, 1804, by Messrs. *Gee* and *Osborne*, and Mrs. *Burton*, the trustees under the will of Mr. *Burton*, against Mr. *Todd*, to compel the specific performance of an agreement concluded in *August*, 1802, for the purchase of an estate. In *June*, 1806, the common order for a reference to the Master to inquire whether a good title could be made, was obtained by the Plaintiffs. In *December*, 1807, the Master reported that a good title could not be made. To this report, the Plaintiffs took an exception, which was overruled in *May*, 1809. No further proceedings have occurred in that suit.

In *October*, 1808, Mr *Todd* filed a bill against *Gee* and *Osborne*, the trustees, and against the persons interested in taking the accounts under the will of Mr. *Burton*, praying specific performance of the agreement, and that for that purpose the necessary accounts might be taken, or, in case a good title could not be made, compensation for the injury sustained by the Plaintiff from the non-performance of the contract. In *December*, 1813, a decree was pronounced in this cause, directing the necessary accounts and inquiries, in order to ascertain whether a good title could be made. In *December*, 1816, the Master made his report, stating that a good title could be made to the estates in question, except that the vendors had not shown that the 227 acres in the agreement described as tithe free, or subject only to a very trifling modus, were not subject to tithe.

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The decree, therefore, in the second suit, is nearly of course. The Plaintiff, Mr. *Todd*, is entitled to a specific performance, and to a compensation for the tithes of the 227 acres. The only questions are, first, on what principle the accounts must be taken? and, secondly, by whom the costs must be paid?

By the agreement in *August*, 1802, it was stipulated that the purchase money should be paid by instalments, one third on the 10th of *October*, 1802; one third on the 5th of *January*, 1803; and the remaining third on the 5th of *April* following, a good title to the estates being then made. The purchaser paid the first instalment, amounting to 5333*l.* 6s. 8*d.* on the day appointed, the 10th of *October*, 1802; and the vendors have ever since retained that sum; and have also received all the rents and profits of the premises, Mr. *Todd* never having been admitted into possession of any part. An abstract was delivered in *January* or *March*, 1803, and was returned by Mr. *Todd* before the *May* following, with the objections of his counsel, the principal of which was, that the title could not be approved unless certain accounts were taken in a court of equity. The vendors insisted that the taking of those accounts was not necessary; and instituted a suit in *May*, 1804, to compel the purchaser to accept the estate without that preliminary. Their attempt failed; and Mr. *Todd* having subsequently filed the second bill for the purpose of having the accounts taken, was resisted by the vendors, but ultimately succeeded. The vendors then having been uniformly wrong, while the purchaser was uniformly right, and having continued in possession of one-third of the purchase money, and in the receipt of all the rents and profits of the estate for upwards of 15 years, the question arises, Upon what principle the accounts are to be taken?

The usual course is, that the purchaser shall receive the rents, and pay 4*l.* *per cent.* interest on the purchase money,

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— a practice rather hard, where the delay is not caused by him; the rents seldom yielding 4*l.* *per cent.*, and the purchaser, after having been deprived of the enjoyment of the estate, receiving it at last in a worse condition. In the present case, a delay of 15 years has been caused by the resistance of the vendors; and I think it is necessary to distinguish this case from those in which the Court has adopted the rule of giving to the purchaser the rents and profits of the estate, and to the vendor, interest on the purchase money. That rule was founded upon the principle recognized by Courts of Equity, that from the moment of the contract, although no purchase money is paid, the estate is to be considered as the property of the purchaser, and the purchase money the property of the vendor. But, in this case, the immediate payment of a part of the purchase money (no less a sum than 5600*l.*) requires a deviation from the usual practice. The vendors have not only continued in possession of the rents and profits for the last 15 years, but, during that long period, have also enjoyed the benefit of this large portion of the purchase money, and instead, as in the common case, of now receiving the whole amount with simple interest in a gross sum, they have had the opportunity of making compound interest, on one third part, during a number of years sufficient to double the principal. If therefore, in this case, the common rule were adopted, the effect would be to give to the vendors, who from the issue of the suit stand as aggressors, a double advantage, and to subject the innocent purchaser to a double loss, namely, a loss of the benefit to be derived from an *annual* receipt of the rents, and of such profit as a continued use of his 5600*l.* would have given to him, beyond the interest for which he would now have been accountable to the vendors. That rule would bestow on the wrong doer all the benefit of his own delay, and inflict all the evil on the rightful suitor.

Under these circumstances equity demands that some

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mode should be adopted by which the purchaser may be placed as nearly as possible in the same situation as if no part of the purchase money had been paid. The case is novel, and I am aware of no precedent, but on principle I think, that as in strict justice and conscientious dealing, a proportionate share of the estate should have been conveyed to him, in immediate exchange for his purchase money, the most equitable course in the power of the Court appears to be, in addition to the usual directions, to allow to the purchaser interest upon the rents and profits of so much of the estate as is proportionate in value to the purchase money already paid.

It may be said that Mr. *Todd* might have applied for an order that the 5333*l.* 6*s.* 8*d.*, or the rents and profits, should be brought into Court and laid out; but he has not done so, and the vendors have enjoyed the benefit of his omission.

Under the circumstances, I am of opinion, that the vendors ought to account, not only for the rents and profits of the estate from *October*, 1802, but also for interest after the rate of 4*l.* *per cent.* upon one-third of the rents and profits.

The costs of both suits must be paid by the Defendants to the second suit. The original bill must be dismissed with costs, because the vendors, apprised of the objections, instituted a premature and improper suit, omitting to provide the only proper mode of settling the question. As to the second suit, The vendors took no steps to amend the original bill, and adapt it to the purpose of obviating the objections to the title. Mr. *Todd* had therefore no means of obtaining a specific performance of the agreement but by the institution of the second suit. The vendors opposed his claim without success, and a specific performance was decreed. There was no inconsistency on the part of Mr. *Todd.* The provisions of the will rendered it necessary that

that the accounts should be taken; a proceeding in which all the parties to the second suit were interested. The vendors must be at the expense of clearing the title by taking the accounts, and therefore Mr. *Todd* is entitled also to the costs of the second suit.

"His Honor doth order that the Plaintiff's bill in the first mentioned cause stand dismissed out of this Court, with costs to be taxed by Mr. *Courtenay*, &c., and in the second mentioned cause, His Honor doth declare that the Plaintiff is entitled to a specific performance of the agreement, and to a compensation in respect of the 227 acres of land agreed to be sold, not being tithe free or paying only a trifling modus; and it is ordered that the said Master do settle such compensation, and take an account of what is due from the Plaintiff in the second mentioned cause, to the Defendant *Robert Osborne*, the surviving trustee, for the remainder of the purchase money for the estate and premises called *Turner Hall*, and the timber thereon, according to the particulars and conditions of sale, and the agreement dated the 7th day of *June*, 1803, in the pleadings mentioned, and compute interest thereon after the rate of 4*l.* *per cent.* *per annum*, as to the sum of 5637*l.* 15*s.* 2*d.* part thereof, from the 5th day of *January* 1803, and as to the sum of 5637*l.* 15*s.* 2*d.* the residue thereof, from the 5th day of *April*, 1803, when the respective portions of the purchase money ought to have been paid, and deduct them from what the said Master shall settle for such compensation; and it is ordered that the said Master do take an account of the rents and profits of the said premises, accrued since the 10th day of *October*, 1802, received by the said Defendants *Richard Gee* and *Robert Osborne*, or either of them, or any person or persons by their or either of their order, or for their or either of their use, and in order thereto the parties are to produce before the Master upon oath all books, papers, and writings in their custody or power relating thereto, and are to be examined upon inter-

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rogatories as the said Master shall direct; and it is ordered that the said Master do compute interest at 4*l. per cent. per annum*, on one third part of the said rents and profits which have accrued and become due and been received as aforesaid, in each and every year since the said 10th day of *October*, 1802, from the respective times when such rents respectively were so received; and it is ordered that the said Master do tax the costs of the Plaintiff and the Defendants *R. C. Burton*, *N. C. Burton*, *John Clitheroe*, and *Sarah* his wife, *Thomas Mauleverer* and *Mary Mauleverer*; and it is ordered that the Plaintiff do pay to the said Defendants their costs when taxed, and pay the amount of the money which shall be taxed for his own costs of both the said causes to Mr. *W.*, his solicitor; and it is ordered that the Plaintiff deduct the same, and also the said rents and interest, out of what shall be found to remain due to the said Defendant *Robert Osborne*, the surviving trustee, for the purchase money and interest; and it is ordered that the said Plaintiff do pay the residue thereof into the bank with the privity of the Accountant-General of this Court, in trust in this cause; and His Honor doth continue the reservation of farther directions, and any of the parties are to be at liberty to apply to this Court as there shall be occasion."

Reg. Lib. B. 1817, fol. 1802.

The ATTORNEY-GENERAL, (at the Relation of WILLIAM IZARD,) - - - INFORMANT; JAMES BROWN, JOHN HALL, and forty-six others, DEFENDANTS.

1816. *April* 10, 11. *Nov.* 25.
1818. *April* 3.

Commissioners appointed by act of parliament, being authorized to levy a rate (not exceeding a certain proportion of the poor-rate) on the occupiers of all houses, &c. in *Brighton*, for paving, lighting, and watching the town, and another rate, not exceeding a fixed sum, on every chaldron of coal, landed on the beach, or otherwise brought into the town, for repairing or building works to protect the coast of *Brighton* against the encroachment of the sea, (the act reciting that the inhabitants were unable to raise money sufficient for that purpose without the aid of parliament,) with power of distress for non-payment, and liberty to apply any surplus of the coal-rate, after payment of the debt contracted on the security of that rate, and the expenses of repairs, &c. in aid of the rate for paving, &c.; to an information by the Attorney-General, at the relation of an inhabitant, filed against forty-eight commissioners (the whole number being a hundred), by the description of Acting Commissioners, stating that the commissioners had, during several years, levied the coal-duty at its maximum, and applied a large proportion of the produce in aid of the town-rate for paving, &c. instead of the construction and repair of works for the protection of the coast, and the discharge of the debt contracted on the security of the coal-duty, and had distrained the goods of the relator for non-payment of the duty, and praying an account of the money levied and expended, an injunction against an undue levy, and a direction that the commissioners should replace any sums which they had applied to purposes not warranted by the act, a general demurrer for want of equity, and a demurrer *ore tenus* for defect of parties, were over-ruled: the Lord Chancellor being of opinion, that a parliamentary grant of a duty on coal imported into a town, in aid of the pecuniary inability of the inhabitants to protect the town from the encroachment of the sea, is a gift to a charitable use; that a clause in the act directing suits to be prosecuted against the treasurer only, was not applicable to cases in which adequate relief could not be obtained except against the commissioners; and that the information might be sustained against the acting commissioners only, for the purpose of relief in respect of their past acts, and for the purpose of prospective regulation other commissioners might be made parties as they qualified and assumed the functions under the provisions of the act.

BY an act of parliament, passed in the 13th year of the king, for paving, lighting, and cleansing the town of *Brighton*, and removing and preventing nuisances and annoyances; for holding and regulating a market within the town; for building and repairing groyns, in order to render the coast safe and commodious for ships or vessels to unload and land sea coal, culm, and other coal, for the use of the inhabitants of the said town, and for laying a duty thereon; and for other purposes (*a*); commissioners were appointed for carrying the act into exe-

(*a*) 13 *Geo*, 3. *c*. 34.

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cution, with power (among other things) for seven or more of them, to direct the streets, lanes, and ways within the town to be cleansed and lighted in such manner as they should think necessary, and for defraying the expenses so incurred, in every year after passing the act, (the first year to be computed from the 25th of *December*, 1772,) or oftener if they should think necessary, to make one or more rate or rates, assessment or assessments, to be signed by seven or more of them, on the tenants or occupiers of all houses, shops, warehouses, &c. tenements or hereditaments, within the town, not exceeding in the whole in any one year three shillings in the pound on the rate made for the relief of the poor; the money so raised to be be paid to the collector, with powers of distress and sale in case of non-payment. After certain provisions, among others, for enabling any person, under an order from five or more of the commissioners, to inspect the poor-rates, and for authorizing the commissioners to borrow money on the credit of the rates arising under the act, one section, reciting that "the town of *Brighton* is situated by the sea-side, and within six miles of the port or harbour of *Shoreham*, and belongs to the said port, and that great part having been destroyed by the breaking in of the sea, several groyns were some years since erected which have preserved the town, and the coast is now safe and commodious at several times of the year, for ships and vessels to unload and land sea-coal, culm, and other coal, on the beach of the town, for the use of the inhabitants; and that the said groyns are become greatly out of repair, and the inhabitants of the town are not able to raise money sufficient to repair the same without the aid and authority of parliament," constituted and appointed the commissioners, or any seven or more of them, trustees for repairing, improving, maintaining, and preserving the said groyns, and erecting and building any new groyns, or such other works as to them, or any seven or more of them, at any general meeting assembled for putting in execution the powers by the act given, should seem most proper. The following section

section enacted that, "for the better effecting and support of the premises, there should, from the 24th day of *June*, 1773, be paid to the said trustees and their successors, or such persons as seven or more of them should appoint, the sum of sixpence for every chaldron of sea-coal, culm, and other coal, that should be landed on the beach of the coast at the town of *Brighton*; and the said trustees and their successors, &c. were authorized and empowered to collect and receive the said sum of sixpence from the masters or owners, or other persons having the rule or command, of every ship or other vessel, for every chaldron of sea-coal, culm, or other coal, landed and discharged out of any ship or vessel on the beach or coast of *Brighton*, or otherwise brought into the said town within the parish of *Brighton*. The act also authorized the trustees to distrain for non-payment of the rate, and to assign the rate as a security for money borrowed, not exceeding the sum of 1500*l*.

The information filed the 26th of *November*, 1814, stated, that by an act of parliament passed in the fiftieth year of the king, entitled, "An act to repeal an act made in the thirteenth year of his present majesty, for paving, lighting, and cleansing the town of *Brighton*, and removing and preventing nuisances and annoyances therein; for regulating the market, for building and repairing groyns to render the coast safe and commodious, for landing coal and culm, and laying a duty thereon, and for making other provisions in lieu thereof; and for regulating weights and measures, and building a town hall" (*a*); the former act was repealed, except so far as relates to the market, and certain persons named were constituted commissioners for putting the present act into execution, with power to appoint a treasurer and clerk, and a collector or collectors of the rates or assessments to be levied, and the monies to be received by virtue of the act, and a surveyor or surveyors, and such other

(*a*) 50 *Geo.* 3. *c.* xxxviii.

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officers for the necessary execution of the act as they should think proper; and such persons so to be appointed were to deliver to the commissioners, correct accounts in writing of all monies, matters, and things received or committed to their charge, and the commissioners were to cause proper books to be kept, in which regular entries and accounts should be made of the several meetings held in pursuance of the act, and of the commissioners present thereat respectively, and of all acts and proceedings whatsoever concerning the act, and also an account of all monies assessed or raised and received, or payable by virtue thereof, and of the application and payment thereof, and of all contracts to be made by virtue of the act, all which accounts should be examined and settled by the commissioners, or any thirteen or more of them, assembled at any meeting to be held in pursuance of the act, who, together with their clerk, should subscribe their names to the same; and all entries so signed should be admitted in evidence if necessary in any court; and such books should be kept by the clerk for the time being, or by such other person and at such place as the commissioners should direct, and should at all convenient times be open to the inspection of the commissioners, and of all other persons rated and assessed for the purposes of the act, or otherwise interested therein; and it was enacted, among other things, that for raising money for defraying the several charges and expenses of paving, watching, cleansing, and lighting the town, and all other charges and expenses attending the execution of the act, (except so far as therein otherwise provided for,) and for defraying the interest, and repaying the monies borrowed upon the credit of the rates and assessments for paving, &c. directed to be levied by the former act, it should be lawful for the commissioners once in every year, or oftener if they should think it necessary, the first year to be computed from the 1st day of *January*, 1810, to make one or more equal rate or rates, assessment or assessments, to be signed by any thirteen or more of the commissioners for the time being, upon the tenants or

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occupiers of all houses, shops, &c. tenements or hereditaments whatsoever within the town, so as such rates or assessments did not exceed in the whole, in any one year, the sum of 4*s*. in the pound on the scale for the time being, on which rates are raised for the relief of the poor of the parish aforesaid; and the commissioners were empowered from time to time, when they should judge necessary, to borrow at interest any sums not exceeding the sum thereinafter mentioned, upon the credit of the rate for paving, &c., and by any writing under their hands and seals to mortgage or assign the rate, or any part thereof; provided that nothing therein contained should authorize the commissioners to borrow on the credit of the rate for paving, &c., any larger sum than 3000*l*., until the sum of 3720*l*., already borrowed upon the credit of the said rate, was reduced to a sum not exceeding 2000*l*., except for the purpose of building a town hall and offices thereto; and it was further enacted, that it should be lawful for the commissioners to continue the market established under, and to collect the rents or tolls payable by virtue of, the former act, which empowered the commissioners, for the purpose of improving the market, to borrow any farther sums of money, not exceeding in the whole the sum of 5000*l*., upon the credit of the market, and the rents, profits, and tolls thereof; and it was further enacted, that after the monies which were then due, or which should be afterwards borrowed, upon the credit of the market, or the rents, profits, and tolls thereof, should have been fully paid and satisfied, it should be lawful for the commissioners, and they were thereby required, to pay and apply any surplus that might have arisen from the market, or the rents or tolls thereof, either in aid of the rate for paving, &c., or the duty thereinafter directed to be levied upon coal and culm, as to them should seem reasonable and proper; and after reciting the provision of the former act, that the commissioners named therein should be trustees for repairing, improving, maintaining, and preserving the groyns that had been erected for the preservation of the town, and erecting

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erecting and building any new ones, or such other works as should appear to them most proper for that purpose, and that the sum of sixpence should be paid for every chaldron of sea-coal, culm, and other coal, landed on the beach of the coast of the said town, and that the commissioners might borrow any sum not exceeding 1500*l.* upon the security of the said duty; and farther reciting that the commissioners had accordingly borrowed the sum of 1500*l.* upon the security, part of which was then due; and that since the passing of the former act, great encroachments had been made by the sea upon the coast adjoining the said town, and that the said duty had been found inadequate to the charges and expenses of erecting new groyns, walls, and other fences or works which were necessary for the safety and protection of the town against such encroachments; the act authorized and required the commissioners from time to time as to them should seem necessary and expedient, to repair, improve, and maintain, add to, alter, or remove the groyns, or fences, or works, then already erected and built or to be made, erected, and built, or to cause to be made, erected, or built, new groyns or other works whatsoever, which might appear to them necessary or proper for the safety of the town or any part thereof, or any part of the beach or shore within the town, and enacted that there should be paid to the commissioners, or to their collector, &c. any rate or duty which they should think fit to direct, not exceeding the sum of three shillings for every chaldron of sea-coal, culm, or other coal, landed on the beach, or in any other manner by land-carriage or otherwise brought or delivered within the limits of the town: and the act, after divers clauses for enforcing the payment of the last-mentioned tolls, and for other matters relative thereto, authorized the commissioners for the purpose of maintaining, repairing, or improving the present groyns or works for the protection of the town, and for erecting new groyns or works, and for making, repairing, and improving the same, to borrow upon the credit of the said rate 5000*l.* in manner therein mentioned.

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The information further stated, that the acting commissioners under the last act of parliament were the Defendants. That at a meeting of the commissioners, held on the 2d of *May*, 1810, it was resolved, that *Thomas Attree* of *Brighton* should be appointed clerk and treasurer to the commissioners, giving security to their satisfaction, (which security they had neglected to take, and which offices of treasurer and clerk ought not to be holden by the same person, the duties thereof being incompatible); and at the same meeting it was likewise resolved, that *William Gates* of the said town should be appointed collector of the tolls and rates, and *Attree* and *Gates* had ever since, and still acted in the said respective offices, and at the last-mentioned meeting, the commissioners directed that from that day, (the 2d *May*, 1810,) until the 1st of *May*, 1811, the duty on coal should be three shillings per chaldron; and at successive annual meetings of the commissioners, the coal-duty was continued at three shillings, until the 1st of *May*, 1815. That the duty of three shillings per chaldron was accordingly levied by *Gates* in each of the years from 1810 to 1815, on all the sea-coal, culm, and other coal landed on the beach, or brought to the town, and *Attree* received from *Gates* the sums so levied, and after payment of the interest which accrued due on the debt of 1140*l.*, the residue of the debt of 1500*l.*, contracted on the credit of the former duty on coal, and of all the expense incurred in erecting or repairing groyns under the said acts, there was at the end of each of the said years a very large surplus of the said monies, which on the 29th of *November*, 1813, amounted to 4808*l.* 15*s.* 7*d.* That it was the duty of the commissioners to apply a sufficient part of the surplus in payment of the debt of 1140*l.*, and the surplus or remainder of the sum of 4808*l.* 15*s.* 7*d.* would have been more than sufficient to answer the expenses of erecting or repairing groyns for some years to come; but the commissioners, in breach of their duty, and without any necessity, on or about the 10th of *December*, 1813, resolved that the sum of 2000*l.*, in four several sums

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of 500*l.* each, should be borrowed, at 5 per cent., on the credit of the coal-duty, and should be repaid by the treasurer thereout as follows, viz. 500*l.* and interest at the expiration of six months, 500*l.* and interest at the expiration of twelve months, 500*l.* and interest at the expiration of eighteen months, and the remaining 500*l.* and interest at the expiration of twenty-four months, from the time such monies should be advanced.

The information further stated, that on the 12th of *January*, 1814, the commissioners, or some of them, in pursuance of the said resolution, signed three several debentures for 500*l.* each, which money was paid to the commissioners or to their treasurer *Attree*, for their use, by Mr. *Thomas West*, one of the commissioners. That the commissioners, or some of them, on the 2d of *March*, 1814, signed another debenture for 500*l.* to *West*, which money was also paid to them or to *Attree* their treasurer, for their use. That the commissioners have in every year, from the passing of the act to the present time, misapplied a very considerable part of the money arising from the duty on coal, and that although the act of the fiftieth year of his present majesty gave power to the commissioners to impose a duty on coal, not exceeding three shillings per chaldron, to repair, &c. the groyns, walls, or other fences or works necessary or proper for the safety of the town, or any part thereof, or any part of the beach or shore within the town, yet the commissioners have constantly, during the period aforesaid, applied a very considerable part of the monies arising from the said duty, in aid of the rate for paving, &c. the town; and that the commissioners imposed, at the several times aforesaid, the duty of three shillings per chaldron on coal, not merely for the purpose of erecting and repairing the groyns as aforesaid, but that they might have a much larger fund to apply, in case of the town rate.

The information proceeded to state, that on the 4th of *June*, 1810, the balance of the money arising from the coal-

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coal-duty, after payment of the charges of erecting and repairing groyns and other incidental expenses, amounted to 800*l.* 15*s.* 3*d.*; in *November*, 1810, such balance amounted to 1613*l.* 5*s.* 3*d.*; in *November*, 1811, to 2209*l.* 10*s.* 10*d.*; on the 31st of *December*, 1812, to 3657*l.* 8*s.* 1*d.*; and on the 29th of *November*, 1813, to 4808*l.* 15*s.* 7*d.*; and the total of the duty on coal from the 29th of *November*, 1813, to the present time, amounted to a very considerable sum, in addition to the said sum of 4808*l.* 15*s.* 7*d.* That it appeared from the treasurer's account, that the expenses of paving &c. the town, exceeded the receipts under the town-rate, on the 4th *June*, 1810, by 1004*l.* 7*s.* 8*d*; on the 23d *November*, 1810, by 1222*l.* 0*s.* 9*d.*; on the 28th of *November*, 1811, by 3078*l.* 5*s.* 10*d.*; on the 1st *January*, 1813, by 5309*l.* 7*s.* 11*d.*; and on the 29th *November*, 1813, by 7592*l.* 13*s.* 0*d.* That the annual deficiencies of the town-rate to answer the said expenses were in a great measure made good out of the general balances of the coal-duty. That it appeared by the said respective statements that very large sums arising from the coal-duty had been unjustly and improperly applied by the commissioners in aid of the rate for paving, &c., whereby persons not resident in the town, but occasional visitors thereto, and who greatly contribute to the support thereof, had been compelled to pay a large proportion of the expenses which ought to have been borne by the resident inhabitants, viz. the expenses of paving, lighting, cleansing, and watching the town. That although the act confined the sums of money arising from the coal-duty and the other tolls and duties thereby made, and the town-rate, to the respective purposes before mentioned, yet the commissioners, in breach of their duty, had lately, out of the funds arisen from the rate on coal, caused to be erected a bathing-house on the beach of the town, the building of which was attended with a very considerable expense, and had applied the said trust-fund to several other improper purposes, in violation of the act.

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The information then stated, that it appeared by the books kept by the commissioners, that on the 21st of *May*, 1811, it was resolved by them that *W. R. Nott* (one of the acting commissioners) should be paid the sum of 500*l.*, in addition to the sum of 70*l.* paid by *Attree*, on account of his expenses relative to the act, and that *Attree* should be paid 300*l.* on account of the act; and on the 11th *June*, 1810, it was resolved that the sum of 73*l.* 18*s.* 9*d.* should be granted to *Nott* as a remuneration for his active services; and accordingly the said sums, or a considerable part therof, were paid to the said respective persons out of the fund arisen from the coal-duty. That no part of the sum of 2000*l.*, borrowed by the commissioners upon the credit of the coal-duty, had been applied by them to the repairing, &c. of any groyns or other works necessary or proper for the safety of the town, or any part thereof, or any part of the beach or shore within the town; but the last-mentioned sum had been applied by the commissioners to very different purposes, contrary to the act, and in violation thereof, and of their duty in the due execution of the same. That the relator had applied to and required the commissioners, and *Attree* and *Gates*, not to proceed to compel payment of the duty on coal so directed by the commissioners to be raised, until the whole amount of the money collected and levied as aforesaid had been justly and fairly expended according to the meaning of the act; but the commissioners, their treasurer and collector, had notwithstanding, proceeded to levy a distress upon the goods of the relator for the duty on coal claimed by them to be due from him, and had actually seized and carried from off the premises of the relator coal to a larger amount than the duty so claimed.

The information charged that the act meant and intended that the commissioners, before they imposed any duty upon coal, should calculate, or procure an estimate

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of, the probable amount of the expenses to be incurred in the then current year, for repairing, &c. the groyns and other fences which might be necessary for the protection of the town against the encroachment of the sea, and that such a duty only ought to be imposed upon coal as would be sufficient to raise a sum equal to such expense, but for no other purposes; and that if it should happen that the commissioners were mistaken in their calculations, or that the estimate should exceed the sum expended, and that such excess should leave an inconsiderable surplus of the coal-duty after payment of the sums borrowed thereon, and the aforesaid expenses, and if there was no probability that any farther sum would be immediately wanted for the erection and repair of the groyns, then, but not otherwise, such inconsiderable surplus might be applied in aid of the town-rate. That the commissioners did not make, or cause to be made, any estimate or survey previously to imposing the coal-duty, for ascertaining the amount of the probable charges and expenses that would be necessary in erecting and repairing, &c. the groyns or other works, so that in imposing the duty of three shillings a chaldron on coal, they did not at all regulate themselves by the amount of such expenses, but, on the contrary, always imposed such duty, in order to raise a sum of money to be applied in aid of the town-rate, and well knew at the respective times when they imposed the duty on coal, that for the mere purpose of repairing, &c. the groyns, and erecting or building any new ones or other works, there was no necessity to impose such duty, and that the money in hand, arising from the previous duty levied, was more than sufficient to answer such expenses, or that at least a much less rate or duty than three shillings per chaldron would have been sufficient. That the expenses of repairing, &c. the groyns and other works never in one year were equal to the sum raised for that purpose, but, on the contrary, the duty in every year greatly exceeded the expenditure. That in no case were the commissioners at liberty, under the act of the

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50 *G.* 3., to apply any part of the duty arising from coal in aid of the town-rate, until they had paid off all monies which had been borrowed upon the credit of the coal-duty. That *Attree*, the treasurer to the commissioners, by their direction, had carried the amount of duties arising from coal, and the rents and tolls of the market, and the rates and assessments made on the inhabitants of the town, to one general account, and they had thereby appropriated the balance in their hands, or in the hands of *Attree*, on account of the duties arising from coal, to the payment of the deficiency in the rates and assessments on the inhabitants of the town. That the receipts of the duty on coal ought to be applied exclusively to the payment of the monies properly charged on such duty by the commissioners, and the expenses of erecting and repairing, &c. the groyns, and that no farther rate or duty should be imposed upon coal, but for such purposes. That though the money in hand, arising from the receipts of the coal-duty, was more than sufficient to answer the above purposes for a considerable time to come, yet the commissioners threatened to levy three shillings per chaldron under the rate last made, and likewise to impose another similar rate upon the expiration of the old one; and that the commissioners ought to be decreed to replace to the account of the coal-duty all such sums of money which they had improperly taken from the produce of that duty, and applied to purposes to which they were not applicable under the second act.

The information prayed, a declaration that the commissioners are not entitled under the act of the 50 *G.* 3. to impose any duty on coal landed on the beach of the town of *Brighton*, or in any manner, by land-carriage or otherwise, brought or delivered within the limits of the town, except for the purpose of repairing &c. the groyns, walls, or fences, or works already erected and built, or to be made, erected, and built, for the safety of the said town; an injunction to restrain the commissioners from imposing

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any duty or assessment on the coal so landed or brought to *Brighton* but for the purposes last mentioned, and to restrain the commissioners from levying, and *Attree* and *Gates* from receiving or collecting, any sum or sums of money under any duty or assessment on such coal which should not have been made for such last-mentioned purposes; an account of all the monies collected by *Gates* and received by *Attree*, or by the commissioners, in each year from the passing of the second act to the present time, in respect of the duty on coal, and of the application thereof in each of the said years, and of the expenses incurred in each year, in the repairing &c. the groyns, walls, fences, or works erected for the safety of the town, and in erecting and building new ones, and an account of the money borrowed by the commissioners, and then due, on the credit of the coal-duty, and what money had been applied in payment of the interest on such debt; that the balance of the coal-duty so received by *Attree*, or by the commissioners, after deducting the expenses of supporting and erecting fences against the encroachment of the sea, and the payment of the principal, if any, and the interest of the debt contracted on the said duty, might be ascertained and applied in payment of the debt due thereon, and that the residue of such balance might be applied exclusively to the payment of the expenses of supporting, maintaining, and erecting fences necessary to prevent the encroachment of the sea; and if it should appear that the money arisen from, or borrowed on the credit of, the duty on coal, since the passing of the second act, had been applied to purposes not warranted by the act, then that the commissioners might be decreed to replace such money to the account of the duty on coal, and that in the mean time they might be restrained from borrowing any farther sum on the credit of the coal-duty, and that all the commissioners might be directed to keep distinct accounts of all monies hereafter to be levied under the act.

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In addition to the clauses stated by the information, the act of the 50 *G.* 3. enacted, that all actions or suits which the commissioners might find necessary to prosecute, for the recovery of any damage or sum of money due to them, by virtue of the act, should be commenced and prosecuted in the name of their treasurer for the time being, and that all actions and suits which it might be necessary for any other person to commence or prosecute, on account of any contract made by the commissioners, or any of them, as such, or by any other person on their behalf, in pursuance of the act, for the non-performance of such contract, or for any other act or thing done by the commissioners, or any of them, or any other person by their order, in pursuance of the act, should be commenced and prosecuted against the treasurer for the time being. The 112th section authorized the churchwardens and overseers of the poor to grant a drawback of the duty to such poor persons as were not able to pay the same, on any coal for their own use, not exceeding two chaldrons in one year. The 116th section enacted, that after the money then due, or which should thereafter be borrowed, upon the credit of the duty arising from coal, and the expenses incurred in erecting and maintaining the groyns and other works, should have been fully paid, it should be lawful for the commissioners to apply any surplus that might thereafter arise from the said duty, in aid of the rate for paving, &c. as to them should seem reasonable and proper.

In *December*, 1814, the Defendants filed a general demurrer, showing "that His Majesty's Attorney-General hath not, by the said information, made such a case as entitles him, in a court of equity, to any such relief against these Defendants, touching the matters in the said information mentioned and complained of, as is thereby prayed, or any other relief in a court of equity." — On the argument before the Vice-Chancellor, the Defendants alleged,

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ore tenus, as another cause of demurrer, a want of parties. The demurrer having been allowed by His Honor (*a*), was now argued on appeal.

Mr. *Leach* and Mr. *Horne*, in support of the demurrer.

This is a case *primæ impressionis.* No precedent has been produced of an information similar to the present. In the absence of authorities, (itself a forcible argument against the relator,) it is clear, on principle, that the Court cannot entertain jurisdiction in a case such as is here stated, or in any case administer the relief here prayed.

The case stated is, that certain commissioners, authorized by an act of the legislature to impose, within a limited district, two distinct rates, affecting distinct descriptions of property, and applicable respectively to purposes of two distinct classes, each beneficial to the town of *Brighton*, have consumed on purposes of the one class an undue proportion of the rate which was appropriated to purposes of the other class. That statement presents no ground for the interference of a court of equity. Such a provision cannot be represented as a gift to charitable uses. Here is no gift; no transfer of a fund; it is a mere compulsory levy, authorized by the legislature; a local tax. What analogy exists between such an exercise of sovereign power, and the act of an individual proprietor devoting a portion of his property to public purposes?

The cardinal objection to this information is, that it requires the Court of Chancery to administer criminal law. Your Lordship is prayed, first, to declare that the conduct of the commissioners is a crime at law, (a singular office for a court of equity); next, to restrain by injunction the commission of that crime, in order that, if repeated, it may be punished in the form of process for contempt of Court;

(*a*) 21 *Jan.* 1815, Reg. Lib. A. 1814. fol. 304.

and,

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and, finally, to compel the commissioners to replace sums misapplied; in other words, to inflict a fine. A court of equity cannot, either on authority or on principle, assume a jurisdiction of this nature.

The information charges that the commissioners have illegally levied, and illegally applied, certain rates; that is, unquestionably, a misdemeanor at law; and the Attorney-General, representing the public, is competent to require from a criminal tribunal the infliction of a punishment due to the offence; but he has no right to the aid of a court of equity for extorting from the Defendants answers to interrogatories which tend to criminate them, or *for enforcing the provisions of the penal code, and interposing* the process of contempt as an additional sanction. A court of equity cannot administer criminal law by injunction.

The information requires the Court to make regulations for the conduct of commissioners under an act of parliament, in effect superseding its operation. The act has provided specific remedies for parties aggrieved; directing suits as well as actions to be instituted against the treasurer as the *only Defendant.* Under that clause can the Attorney-General sustain an information filed, not against the treasurer, (the Defendant who holds that office is made a party only in his character of commissioner,) but against a moiety of the commissioners, and for the purpose of transferring to this Court the administration of a fund which by the express provisions of the act is *confided* to the commissioners?

For any abuse of their powers the commissioners are responsible at law; sums illegally levied may be recovered by action; if the goods of the relator have been distrained for non-payment of an illegal rate he may obtain redress from the ordinary tribunals.

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Even were the case within the jurisdiction of the Court, the relief sought is impracticable. The information prays that the sums misapplied by the commissioners, being replaced by them, shall be, not refunded to the persons from whom they were illegally levied, but appropriated to the future purposes for which the coal-duty may be applicable; in other words, that money unduly taken from particular individuals in 1814 shall be employed in exoneration of persons liable to contribution in 1816: a proceeding inconsistent with the most obvious principles of equity. If the sums in question have been properly levied the relator's case fails; if improperly, they are not subject to the act, and cannot be administered under it. On the allegations *of the information the money now in the hands of the* commissioners, the produce of an unauthorized assessment, is not a fund applicable to the purposes of the act, but may be recovered in an action by the individuals from whom it was illegally taken. Is the Attorney-General to repay to each of those individuals his respective quota? Can he protect the commissioners against their claims? Were it possible, as this information seeks, to render the commissioners personally responsible, how is the money *to be applied? Clearly not under the act, for the ground* of imposing that penalty on the commissioners is that the rates were not such as they were authorized to levy.

Upon these grounds the demurrer on the record must be allowed; but we allege, *ore tenus*, another cause of demurrer, want of parties. Admitting the jurisdiction, the Court will not interpose till the relator has brought before it all the persons by the regulation of whose conduct the public is to be protected. The individuals to whom powers are given by the act are about a hundred, of whom forty-eight only are parties to this suit.

The commissioners not named, it is said, have not acted; but they may qualify and act forthwith. They are not

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not to be represented by those now before the Court, and not only would not be restrained by an injunction granted, or bound by an account taken, in their absence, but are entitled to exercise what they consider as their rights, without regard to the decree. No prospective regulations can be made but in the presence of the whole body. The act has not distinguished acting and non-acting commissioners. Upon what principle can a distinction be made between individuals whom the relator has named as parties, and those whom he has thought proper to omit? There is no allegation that the acts referred to are the acts of the Defendants only. The acts of the acting commissioners, whoever may be present at every meeting, are the acts of all the commissioners. The injunction, if sustained at all, can be sustained against the Defendants only as individuals; but the suit is instituted against them, not as individuals, but as commissioners, and the terms of the prayer, commensurate with the terms of the appointment in the act, comprehend all the commissioners.

Sir *Arthur Pigott*, Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Newland*, in support of the information.

The object of the information is to obtain from the commissioners an account of the money levied and applied under the acts of parliament; the rest of the relief is incidental to the account. It seems difficult to comprehend the arguments by which the commissioners, entrusted with a fund applicable to specific purposes, and appointed under the express denomination of trustees, seek to protect themselves from accounting in this court.

All property in this kingdom belongs either to private individuals, including bodies corporate, or to the public; for injuries to the former the ordinary remedy is an action; for injuries to the latter, an information by the Attorney-General. To one species of private property, however, the policy of the law extends a peculiar protection, and injuries

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to it are redressed neither by action nor by mere information, but by information at the relation of individuals, upon whom the assumption of that character imposes a liability to costs. Property of this description, to a certain degree private, partakes the character of public property, as devoted to purposes in which, though more peculiarly beneficial to certain individuals, every subject is interested. On this demurrer the question is, whether the purposes declared in these acts of parliament, namely, the preservation and improvement of the coast and town of *Brighton*, purposes in which all His Majesty's subjects have an interest, are not public purposes such as entitle any one, in the character of relator, to state a case of abuse. It is not necessary that the purposes be charitable: in describing the practice of the Court on the subject of informations, Lord *Redesdale* mentions charities only as one instance among many, of the cases in which that remedy is allowed. (*a*) Wherever a fund is appropriated to objects beneficial to the nation at large, any individual is entitled to the aid of the Attorney-General for compelling its due administration.

The purpose for which this fund is raised, the protection of the coast from the encroachment of the sea, is expressly enumerated among pious uses in the statute of *Elizabeth* (*b*), from the terms of which principally the Court derives the definition of charitable purposes. (*c*) In describing the property upon which the statute is designed to operate, the preamble specifies property given "for repair of bridges, ports, havens, causeways, churches, sea-banks, and highways." In this instance the funds are appropriated to the preservation of the port and coast, and the repair of sea-banks. Had an estate been conveyed on these trusts, it is indisputable that the due ap-

(*a*) Treatise on Pleadings, p. 7. (*b*) 43 *Eliz.* c. 4.
(*c*) See 2 *Vern.* 387. 9 *Ves.* 405. 10 *Ves.* 541.

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plication of the rents might have been secured by information.

It is true that the fund in this case arises not from the spontaneous donations of individuals, but from a public compulsory contribution under the authority of parliament; but can that circumstance afford a reason for refusing to entertain an information? If, on the petition of the inhabitants of *Brighton*, the legislature had directed, that towards making provision for poor widows, and placing orphans apprentices, sums should be raised by duties charged on goods imported, and ultimately, therefore, paid by the inhabitants, could the mere fact that the fund was provided by public contribution of that nature preclude the Attorney-General from enforcing by this process its just administration? Is it contended that if tolls taken on a canal were devoted to charitable purposes, the trustees could not be brought to a reckoning by information? or that, when the legislature directed *St. Paul's* church to be built from the produce of a duty on coal, no account could be taken of that duty? In the exposition of the statute of *Elizabeth*, contained in *Duke's* Law of Charitable Uses, it is expressly stated, that "an imposition granted upon commodities imported or transported, to be employed upon repair of ports or havens, where they shall land, is a charitable use, and within this statute." (a) That authority is decisive.

The argument, that on the allegations of the information there is no fund in the hands of the commissioners for the purposes of the act, is fallacious. They are authorized to levy money in anticipation, for the protection of the groyns, &c., though no repairs were then necessary, to be applied from time to time, and to borrow on the credit of the rates. To what extent they were so authorized is

(a) P. 35.

not

not the present question. The charge against them is, misapplication of the funds levied under the act. The propriety of the levy, and the propriety of the application, are distinct subjects of inquiry.

It is objected that the conduct imputed to the commissioners, as the ground of the relief prayed, amounts to a criminal offence, and cannot, therefore, be cognizable in a court of equity. The information contains no criminal charge; no allegation that the commissioners have applied the funds to their own benefit. Can it be maintained that the application of them to public purposes, other than those required by the act, is punishable by a criminal proceeding? The commissioners are answerable for a civil breach of trust, but persons acting with delegated authority on the part of the public cannot be charged criminally unless they act from corrupt motives; without that imputation, the wilful and direct violation of an act of parliament will not necessarily subject the parties to criminal process.

Even if the acts imputed were criminal, and such as might be made the subject of an indictment for a misdemeanor, the inference would not be correct, that this Court is deprived of jurisdiction. Transactions may be cognizable both by civil and by criminal tribunals, being the subject of a remedial as well as of a vindictive proceeding. An assault and battery is at once actionable and indictable. Though no suitor can legally entitle himself to a pecuniary demand arising from transactions amounting to felony (a), he may so entitle himself from transactions amounting to a misdemeanor. Were the acts imputed indictable, yet if they constitute a breach of trust, the *cestui que trust* is

(a) *i. e.* before the trial of the offender on indictment; after his conviction or acquittal, the person injured may recover damages, by action for the civil injury. *Crosby* v. *Leng*, 12 *East*, 409., and the authorities there cited.

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entitled to Your Lordship's declaration that they shall not be repeated. The arguments by which this demurrer has been supported extend to oust the jurisdiction of courts of equity in cases of fraudulent deeds, or conspiracies to obtain wills. It is clear that this Court may administer equitable relief where the subject-matter is criminal; as in the instance of nuisances. *Baines* v. *Baker* (*a*), *Coulson* v. *White* (*b*), *Ryder* v. *Bentham* (*c*), *Attorney-General* v. *Doughty* (*d*), *Mayor, &c. of London* v. *Ward* (*e*), *Attorney-General* v. *Cleaver*. (*f*)

The objection of criminality is applicable only to particular interrogatories, and cannot, therefore, support a general demurrer, which proceeds on the assumption that the relator is entitled to no part of the relief sought. Were the information so framed that the commissioners could not be compelled to answer a single question, they might protect themselves against the discovery, but could not for that reason sustain a demurrer to the relief. The Court will distinguish between the question what relief may be proper at the hearing, and the general objection that no relief should be granted.

Upon the statement of the information a clear breach of trust has been committed; the charge is, systematic misapplication, the levy of the coal-duty at its maximum, for the purpose of applying the surplus arising from that levy in aid of the town-rate; in effect exonerating the resident inhabitants of the town at the expense of the occasional visitors. Shall these commissioners, appointed for purposes in which all His Majesty's subjects have an interest, and admitting, as for the purposes of the argument they must admit, the truth of these allegations, protect themselves from the jurisdiction of this Court, and refuse to

(*a*) *Amb.* 158. 3 *Atk.* 750. (*b*) 3 *Atk.* 21. (*c*) 1 *Ves.* 543.
(*d*) 2 *Ves.* 453. (*e*) 5 *Ves.* 129. (*f*) 18 *Ves.* 211.

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render an account of the fund which they have misapplied? It is clear that by this mode only can its due administration be secured, and if this Court refuses to interfere, the case is remediless. In the absence of corrupt motive in the commissioners, an indictment or information at law could not be sustained, for a mistaken construction, and undue execution, of the statute under which they act: by action of trespass the proper application of the funds could not be obtained; and though on appeal to the quarter sessions an illegal rate were quashed, it might at the next meeting be reimposed. The acts have provided no remedy for a case like this: they contain no clause requiring the commissioners to account, nor any provision for examining the propriety of the assessment. The erection of a tribunal for auditing their accounts might have created a difficulty. No other remedy existing, the King, as *parens patriæ*, is entitled, by his Attorney-General, to protect the subject from injustice and vexation, to recal such parts of the fund as have been misapplied, and to secure for the future its due application. It is clear that the commissioners are not protected from the jurisdiction of this Court by the mere circumstance of their appointment under an act of parliament. The Court has regulated the administration of the revenues of the free schools of *Berkhampstead* (*a*) and *Birmingham* (*b*), and in a recent case, assumed jurisdiction over commissioners under an inclosure act. (*c*)

The demurrer on the record, therefore, must be overruled, and the question on this appeal relates to that demurrer only: on the demurrer at the bar, for want of parties, the Vice-Chancellor pronounced no judgment.

(*a*) *Attorney-General* v. *Price*, 3 *Atk.* 108. *Berkhampstead Free School ex parte*, 2 *Ves. & Beam.* 134.

(*b*) *Eden* v. *Foster*, 2 *P. Wms.* 325. *Gilb. Rep.* 178. *Sel. Ca. in Chan.* 36. And see *Attorney-General* v. *The Governors of the Foundling Hospital*, 4 *Bro. C. C.* 165. 2 *Ves.* 42.

(*c*) *Speer* v. *Crawter*, 17 *Ves.* 216.

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On the argument of a demurrer, the Defendant is entitled to demur *ore tenus*, paying the costs of the demurrer on the record.

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If a Defendant cannot sustain the demurrer on the record, he is entitled to demur *ore tenus* (*a*); but, availing himself of that right, he must pay the costs of the demurrer on the record. (*b*)

For the Information.

The demurrer for want of parties is untenable; on the principle that it is necessary to introduce as parties on the record those persons only against whom relief can be obtained. If one of two executors proves the will, the other, though he may at any time obtain probate, is not a necessary party to a suit instituted by a person claiming a legacy in opposition to another claimant, and praying an injunction to restrain the acting executor; against the exe-

(*a*) " On argument of a demurrer, any cause of demurrer, though not shown in the demurrer as filed, may be alleged at the bar, and will support the demurrer." (Lord *Redesdale*, Treat. on Plead. p. 176. *Pile* v. *Price*, 6 *Ves.* 779. *Cartwright* v. *Green*, 8 *Ves.* 405.) But " a demurrer *ore tenus* must be to that which the Defendant has demurred to on the record. If the cause of that demurrer on the record is not good, he may at the bar assign other cause; but he cannot demur *ore tenus* upon a ground which he has not made the subject of demurrer on the record." (Per Lord *Eldon*, C. 17 *Ves.* 215, 216.) And, therefore, on a bill by an heir against persons claiming under a devise, praying a discovery, and that witnesses might be examined *de bene esse*, and their testimony recorded, a demurrer to the discovery having been over-ruled, the Defendants were not permitted to demur *ore tenus* to the examination of witnesses. *Pitts* v. *Short*, 17 *Ves.* 213.

(*b*) " If any cause of demurrer shall arise, and be insisted on at the debate of the demurrer, more than is particularly alleged, yet the Defendant shall pay the ordinary costs of over-ruling a demurrer, if those causes which are particularly alleged be disallowed; although the bill, in respect of that particular so newly alleged, shall be dismissed by the Court." (Order by Lord *Clarendon*, Orders in Chancery, edit. *Beames*, p. 174., copied from an article in the Orders of the Lords Commissioners, published in 1649, *id.* App. p. 488.) Notwithstanding this order, a practice seems to have prevailed of refusing costs to either party, on allowing the demurrer *ore tenus*. See the authorities cited by Mr. *Beames*, p. 174. n. 39.

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cutor who has not proved, or the non-acting commissioner, no relief is sought.

Mr. *Leach*, in reply.

This is by far the most important case that has occurred in this Court since I have known it. The question is, whether in every instance of public contribution under act of parliament not referrible to the head of revenue, a court of equity assumes jurisdiction to render the collecting officer personally responsible for sums levied on an erroneous construction of the act? It is admitted by the Attorney-General that, to this moment, no attempt has ever been made to establish such a jurisdiction. The argument of inconvenience cannot be gravely urged against a system which has prevailed from the Conquest; but were the fact otherwise, this Court can no more make laws on a principle of convenience, than on any other principle.

The proposition of the relator is, that a court of equity may entertain jurisdiction over commissioners appointed by a local act of parliament, and inflict on them a fine for misconduct. At common law, such commissioners, if they corruptly abuse their powers, are punishable for a misdemeanor; if they act erroneously, not corruptly, they cannot be made the objects of a criminal proceeding, the law not unjustly visiting error as a crime; but is no mode provided of instructing them in their duty? For that purpose, beyond question, an information in the nature of *quo warranto* would lie. The case of the Corporation of *Bedford Level* (a), and the authorities there cited, clearly designate that as the proper remedy, where any set of men encroach on the prerogatives of the crown, or on the sovereignty of the legislature; and Mr. Justice *Lawrence* particularly enumerates as fit objects of that proceeding, persons exercising the functions of commis-

(a) 6 *East*, 356.

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sioners under an act of parliament to levy rates for paving a town. (*a*) On the other hand, the individual from whom an unjust levy is made, may maintain an action of trespass, if not replevy the distress. Such are the principles of the common law. The commissioners if corrupt, are criminally responsible; if in error, may be set right, and individuals injured by their acts may obtain redress. Where then is the necessity of giving to a court of equity a jurisdiction without precedent, and, as I contend, against principle?

The duties of the Attorney-General, if I understand them, are these. In courts of criminal jurisdiction, the King, as *parens patriæ*, is the prosecutor; but the sovereign cannot sue before his own tribunal, or address his own judges; for those purposes he is represented by the Attorney-General. Criminal proceedings, therefore, with few exceptions, are in the control of that officer, and in civil courts, the rights of the crown are under his protection. A nuisance in a river or a harbour, or on a highway, may be abated by the hand of the subject; but such abatement becomes not the dignity of the crown; it abates the nuisance by the information of its Attorney-General: by information here, or in the Court of Exchequer; for in every case which concerns not the revenue, the jurisdiction of the two Courts is concurrent. Wherever the subject may abate a nuisance, the Crown may sue by English bill in any court of equity; on the principle, that a public evil exists, which it is the duty and the prerogative of the Crown to remove.

The Attorney-General, the servant, not of the public, but of the Crown, exercises another authority, which requires particular consideration. It is the duty of a court of equity, a main part, originally almost the whole,

(*a*) P. 560.

of its jurisdiction, to administer trusts; to protect not the visible owner, who alone can proceed at law, but the individual equitably, though not legally, entitled. From this principle has arisen the practice of administering the trust of a public charity: persons possessed of funds appropriated to such purposes are within the general rule; but no one being entitled by an immediate and peculiar interest to prefer a complaint, who is to compel the performance of their obligations, and to enforce their responsibility? It is the duty of the King, as *parens patriæ*, to protect property devoted to charitable uses; and that duty is executed by the officer who represents the Crown for all forensic purposes. On this foundation rests the right of the Attorney-General in such cases to obtain by information the interposition of a court of equity; and the relator has therefore insisted, that these acts of parliament constitute a charitable trust. His argument is, that the statute of *Elizabeth* enumerates building bridges and repairing sea-banks among charitable purposes; in other words, that because a repair of sea-banks may, therefore every such repair must, be a charitable use. If a benevolent individual devotes money to the construction and maintenance of a bridge, the design brings the donation within the description of the statute: the motive being charitable, there is no distinction whether the gift proceeds from the Crown, or the legislature, or a private subject; but because a voluntary application of property from such a motive to such a purpose is a charitable trust, can that character be imputed to a compulsory levy, authorised by the legislature? The argument would prove every county bridge a pious use.

It is next insisted, that the information may be supported on the principle, that the King, by virtue of his prerogative, and his duty to the public, has an interest in harbours, rivers, and the sea-coast. No such point can be raised on this record. The information contains no reference to the right and duty of the Crown to protect navigation; on the

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contrary, it expressly asserts that all which ought to have been done for the defence of the coast, and more, has been done; that the commissioners have exceeded the obligation imposed on them in providing for the repair of the groyns, &c. The authority of Lord *Redesdale* is then alleged, that charities form only one of many instances in which the Attorney-General may sustain an information. Lord *Redesdale* has not assumed to declare the law: he undertook no more than to collect decided cases: has he cited any case similar to the present?

It is contended that the commisioners, being in possession of a surplus, may be compelled by this Court to apply it for the purposes of the trust. The principle is unquesable; but omitting the objection, that in a case like the present, the Court will not administer relief at the instance of the Attorney-General, the statement from the bar is at variance with the record. The information alleges that whatever sum is in the hands of the commissioners has been illegally levied, and ought to be repaid. Was it ever heard that money, of which a party had improperly possessed himself, was a trust-fund, to be administered under the direction of a court of equity?

The term trustee in the act (employed once, at least, by mere mistake, for the term treasurer,) cannot affect the question. The character of the commissioners is determined, not by the name under which they are casually described, but by the duties assigned to them, the acts which they are to perform. If these commissioners are trustees, what officer of the Crown is not a trustee? In one sense, undoubtedly, all public offices, even the prerogatives of the Crown, are trusts; but are they trusts which a court of equity will regulate? A trustee, in the consideration of this Court, is the legal owner of property, subject to an equitable claim. On the allegations of the information, the

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commissioners have no legal ownership in the balance of duty misapplied.

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The relator, therefore, not being entitled to relief, the general demurrer for want of equity is good, although he may be entitled to discovery; on the principle, that the discovery is only ancillary to the relief.

Another ground of demurrer urged *ore tenus* is want of parties. It is said that the Vice Chancellor has not proceeded on that ground; that had he overruled the demurrer on the record, he must have charged the defendants with costs. I admit the fact. The Vice Chancellor, thinking the information bad in substance, forebore to examine its form; but is it not competent to the Court of Appeal, is it not a part of its duty, to consider every ground of demurrer alleged? Must we be remitted to argue the objection before the Court below? or are we to be deprived of its aid, because the Vice Chancellor thought we had a better? The validity of the objection is clear; the act, to which, as a public act, the Court must advert, appoints commissioners, who are no parties to the record.

The LORD CHANCELLOR.

Before I pronounce final judgment in this important and difficult case, I shall inform myself of the principles on which the Vice Chancellor proceeded.

With respect to the demurrer *ore tenus*, my present opinion, subject to farther consideration, is, that if I have correctly read the information and the act of parliament, there is no want of parties.

The next question is, supposing the information such, with respect to the nature of its subject-matter, as the Attorney-General may file, at the relation of private individuals, whether the demurrer on the record can be sus-

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tained on any of the grounds stated? It is objected that the information requires the defendants to answer charges amounting to a criminal accusation. On that objection it is clear, not only that if the information requires an answer to matter of criminal accusation, and also to innocent matter, the demurrer must be over-ruled; but that if it requires an answer to criminal matter only, yet that alone is not sufficient to sustain this general demurrer to the whole information, to relief as well as to discovery. Though it is now settled (a doctrine introduced by Lord *Thurlow* (*a*) against the ancient practice) that if the bill prays discovery and relief, a plaintiff not entitled to relief is not entitled to discovery (*b*), the converse of that rule will not hold; because he may be entitled to relief, without being entitled to it through the discovery; and may then obtain a decree, though he has not established his right by the defendant's answer. (*c*)

In a bill for discovery and relief, a Plaintiff not entitled to relief is not entitled to discovery. The converse of the rule will not hold.

I believe it will be found on principle and precedent, that if the Attorney-General can make proof of what he here alleges, though the defendants protect themselves from the discovery, he may obtain relief. The Attorney General is an officer of the Crown, and in that sense only, the officer of the public. (*d*) To decide the question of his competence to sustain this information, the Court must look to every part of it, considering not only whether it contains many points on which he has not, but whether it does not contain some points on which he has, a

The Attorney-General is an officer of the Crown, and in that sense only, the officer of the public.

(*a*) *Fry* v. *Penn*, 2 *Bro. C. C.* 280. *Price* v. *James*, 2 *Bro. C. C.* 319. 2 *Dick.* 697. *Watkins* v. *Bush*, 2 *Dick.* 663.

(*b*) *Potts* v. *Short*, 17 *Ves.* 216. *Gordon* v. *Simpkinson*, 11 *Ves.* 509. *Baker* v. *Mellish*, 10 *Ves.* 553., and the cases there cited.

(*c*) "You cannot demur to a discovery, unless you demur to the relief; for then you do not demur to the thing required, but you demur to the means by which it is to be obtained." *Per* Lord *Thurlow*, *Morgan* v. *Harris*, 2 *Bro C. C.* 124. And see *Waring* v. *Mackreth*, *Forrest*, Excheq. Rep. 129.

(*d*) See 4 *Burr.* 2570. *Wilmot's* Opinions and Judgments, 327, 328.

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right to sue. The question then is neither more nor less than this, can the Attorney-General proceed in this court under this act of parliament? a question not depending merely on the construction of the act. If the demurrer was meant to take the opinion of the Court, whether these persons, call them commissioners or trustees, can not only *de tempore in tempus*, levy duties which they from time to time conceive to be necessary, but while a debt remains on the security of one rate, apply the produce of that rate, not in discharge of the debt, but in aid of the other rate, I cannot conceive that such ought to be the construction of the two acts. I take them to mean, not that the commissioners are to calculate so as never to raise more than is required at the time, but that any accidental surplus of the coal-duty, raised on a *bonâ fide* calculation, may be applied in aid of the parish-rate.

The other point is very material. Whether the Attorney-General can call in this suit for three objects: first restraint; secondly, account; thirdly, application of the money to the purposes of the act? It is said, that this is not a charitable use, and I am not disposed at present to consider it such. But the two acts, *in pari materiâ*, must be taken together; and it is remarkable that the first act never applies to the commissioners the name of trustees, with reference to any other subject than the rate on coal. Unless this Court could interpose, on the first act there would be no remedy any where. The act authorizing the commissioners to raise sixpence on the chaldron would be a defence to the proceeding by information in the nature of *quo warranto*, for levying rates without lawful authority. The duty of sixpence, like the duty of three shillings, is levyable, not on the inhabitants of *Brighton* but on all the King's subjects who shall resort to that town to sell coal. Eventually, indeed, it falls on the inhabitants, who reimburse it to the importer in the price of the commodity; but it is imposed expressly on all the King's subjects re-

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sorting there by land or sea to trade; and imposed only for a particular purpose, and to be raised from time to time, according to the provisions of the act. Every one of the King's subjects has a right, in some court, to insist that such a duty shall not be levied, except in conformity to those provisions. The second act extends the amount of the duty to three shillings; and then comes the question on which I am not at present prepared to say that there is not much positive authority, whether, where a duty is laid on all the King's subjects, in respect of their trade, to be raised for particular purposes, the public, and in right of the public, the Crown, have not an interest if the duties are levied improperly, or if properly levied improperly applied, which the Attorney-General is entitled to protect? I am not disposed to hold that the preservation of the coast is not a public interest; but without adverting to that question, this duty is expressly imposed on all the King's subjects. The case requires accurate examination.

1816.
Nov. 25.

The LORD CHANCELLOR. (a)

I have reflected on this case with great anxiety; since it appears to me, that, supposing the Attorney-General right in his construction of the acts of parliament, it will be very difficult to find an adequate civil remedy for the misapplication of the money collected on the coal-duty, if an information of this kind cannot be supported.

[His Lordship then stated the provisions of the statute 13 *G.* 3., and made the following observations on the clause conferring a power to distrain.]

It has been thought, that if there is a right of distress, there must be a right to replevy, and that it would therefore be difficult to maintain a suit in this Court; but it seems to me that more weight is laid on that observation than

(a) From Mr. *Merivale*'s note.

belongs

belongs to it; for the question would be, with respect to the groyns, not whether an individual can replevy, if improperly distrained upon, but, attending to the whole matter in the information, whether there are any means for compelling that which has been properly levied, to be properly applied? An action of replevin, if decided against the party replevying, would decide only that he was compellable to pay the rate; but the principle which the Attorney-General must maintain here, against the persons who have received that rate, is, that when paid it shall be applied to the purposes of the act, and to no other. Supposing the case rested on this, one great question is, whether this act of parliament, in respect to the coal-duty, would create a charitable use? It seems to have been considered, that because the duty was given by act of parliament it could not be a charitable use. If authority was wanted upon that subject, it would be enough, for my business to day, to refer to the passage cited from *Duke's* Exposition of the Statute of *Elizabeth*. After the fire of *London*, when acts of parliament imposed a duty on coal imported into the city or the river, among other purposes for rebuilding *St. Paul's* church (*a*), beyond doubt that was a charitable use. Money given by a private donor for repairing a church or chapel is a charitable use; and if this is law, there is no reason why money given by the public, if it is applied to a charitable purpose, should not be equally within the statute of *Elizabeth*.

There are many cases which might be the cause of suit against the commissioners, *qua* commissioners, for the treasurer cannot be proceeded against where the act cannot be the act of the treasurer; for instance, suppose the commissioners take possession of the place, by the addition of which the market is to be enlarged; this is a case in which the Court is in the habit of granting an injunction,

(*a*) 19 *Car.* 2. *c.* 3. 22 *Car.* 2. *c.* 11. 1 *Jac.* 2. *c.* 15. 8 *W.* 3. *c.* 14. 1 *Ann. st.* 2. *c.* 12. 9 *Ann. c.* 22.

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but the suit must be against the commissioners, and not the treasurer.

It has been argued, that because the poor are not to pay the duty, therefore this is not a charitable use. I cannot accede to that inference: the poor are not protected from payment, if they consume more than two chaldrons of coal in a year; but on what principle is it necessary that the poor should contribute, in order to render this a charitable use?

The demurrer cannot be sustained on the ground that the matters charged in the information may be considered as matter of offence, to be answered otherwise than civilly, and for two reasons; first, because it is a sufficient answer, that although the Attorney-General chooses to sue civilly, yet he may take care that no one else shall sue criminally; and secondly, that if the Attorney-General can prove his case, without introducing any criminal matter, he will be entitled to relief: but there is another ground of demurrer, which has been stated *ore tenus*, and if it could be sustained, would dispose of this information, without entering into any other consideration; and that is, that there is a want of proper parties. At present, I am inclined to think, that, in this respect, the information is defective; but if that objection can be removed, I should wish this case to be spoken to by one counsel on each side, for I cannot, in opposition to the authority cited, bring myself to the conclusion that this is not a charitable use. If this is a charitable use, it seems impossible, considering the various objects in view, as they are to be collected from the prayer of the information, to contend that, because the relator may have a remedy for his particular grievance, the Attorney-General has no ground of complaint for the misapplication of the duty to be raised.

As to the passage which prays a declaration of the law, if it is part of my duty to declare what is the meaning of

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an act of parliament, I have no doubt in saying the meaning was, that the commissioners should apply only the occasional surplus, which a miscalculation of the expenses for the repair of the groyns might have produced; for the surplus could not be returned to the individuals, and therefore it was thought convenient that it should be applied to another purpose; but it was never the meaning of the act of parliament that under colour of the coal-duty they should levy a duty for paving and lighting the town, any more than for the support of the poor. As to the question, whether they should be restrained, it would be difficult to decide, without satisfactory evidence, that there had been this abuse, and that a repetition of it was meditated; but if this duty can be considered within the intent and meaning of a charitable use, on what ground is it to be said, that the Attorney-General cannot come here, to have an account of the duty, to know how it has been applied, and to obtain directions for the future application of it, in the ordinary way in which he comes for other charitable purposes? I confess, therefore, that unless I hear more to convince me to the contrary, in my opinion, this is a charitable use within the statute of *Elizabeth*; but at present I cannot overcome the objection of want of parties. The information has made the present commissioners the only defendants, whereas the accounts prayed refer to a period when it is not averred that they were the acting commissioners, and when in probability they were not.

The case was again argued by Mr. *Leach*, in support of the demurrer, and Mr. *Bell* for the relator, but the Editor has no note of the argument.

The LORD CHANCELLOR.

1818. *April* 3.

The question in this case turns on the powers and duties of commissioners against whom an information has been filed

filed by the Attorney-General. The act of the 13th year of the King appoints certain persons commissioners for paving, lighting, and cleansing the town of *Brighton*, with directions for the execution of their duty, and a provision that actions may be maintained in the name of one commissioner, or of the clerk or treasurer. After a variety of clauses for effecting its objects, the act authorises the commissioners, seven or more of them, for defraying the expenses of paving, lighting, and cleansing the town, to impose upon the tenants of all houses and other property, a rate not exceeding three shillings in the pound on the rate made for the relief of the poor; and confers a power of inspecting that rate, on inhabitants having an order under the hands of five of the commissioners. The act then empowers the commissioners to borrow money on the credit of the rate; and it is, I think, in the statement of the security for money so borrowed, that the first mention is made of building or repairing groyns. The provisions for this purpose are prefaced by a recital that the town of *Brighton* is situate near the sea, within six miles of the harbour of *Shoreham*, and that great part of the town having been destroyed by the breaking in of the sea, several groyns (by which I understand buttresses constructed for the purpose of supporting the shore) were some years since erected, which had preserved the town, and the coast was then safe and commodious for ships to land coal, &c. and that the groyns were greatly out of repair, and the inhabitants were not able to raise sufficient to repair the same without the aid and authority of parliament; it is therefore enacted, that the commissioners, or any seven or more of them, should be trustees for repairing the old, or building new, groyns, and that for effecting the premises, from the 24th of *June*, 1773, a definite sum should be levied, namely, sixpence on every chaldron of coal landed at the town; and a subsequent clause authorises the trusteees to give security by assignment of the rate for any sum borrowed not exceeding 1500*l.*

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This act continued in force till the year 1810, when another act was passed, by which, after a recital of the insufficiency of the former rate to provide against the inroads of the sea, certain individuals are appointed to repair and maintain the groyns already built, and, if necessary, to build new groyns or works, and, are authorized to levy a sum not exceeding three shillings for every chaldron of coal, &c. landed on the beach, or otherwise brought into the town, and authorised *ipsissimis verbis* for the safety and protection of the town, the inhabitants of which have been described as unable to protect themselves against the ravages of the sea.

It appears extremely difficult to maintain that there does not exist, in some court in this kingdom, an authority, I do not mean to punish for misapplying, or to replevy in case of unduly levying, but to compel the trustees properly to apply, the money which by these acts they were authorized to raise for specific purposes. I have not yet satisfied myself that the recital preceding the power given to the trustees may not, within the doctrines often heard in this court, be represented as the recital of a charitable use; and this is clear, that the fund is set apart for the purpose of aiding the pecuniary inability of the inhabitants to protect themselves from the ravages of the sea.

The act of 1810 contains a clause requiring observation, that all actions or suits by or against the commissioners, shall be prosecuted in the name of the treasurer, or against the treasurer; it then orders books of account to be kept, with liberty of inspection to persons interested, and directs the application of any surplus of the coal-rate, but without a similar direction relative to a surplus of the paving rate. Next follows a clause fixing the quantum of the latter rate, no otherwise than by saying that it should not exceed the proportion of four shillings in the pound on the rate for the relief of the poor, and autho-

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rizing the imposition of a duty on coal to the extent of three shillings a chaldron.

In my view of this act, it is no more than a continuance and augmentation of the provisions of the former act, in aid of that pecuniary inability, which, though not recited in the second act, was the avowed ground of the first, and must be considered as the ground of the second. It is clear, that though the legislature has given to the commissioners a power of raising any sum not exceeding three shillings in the chaldron, yet that power can be duly exercised only to the extent which shall appear to them requisite for the protection of the town or of the shore; a purpose which limits their discretion. The clause itself restricts the authority which it confers, by describing that purpose as its object. Considering the impracticability of precisely ascertaining what sum would be required, where the wisest calculations might be immediately falsified by the violence of the sea, it was reasonable to anticipate that the rate, imposed upon a probable opinion of propriety and necessity, might produce a surplus, and directions are given for the application of that surplus, in aid of the other duties, but not till the debt contracted had been discharged.

Upon the clause entitling poor persons who have paid the duty to a drawback, it is said that the act seems designed for the taxation of the rich in aid of the poor. That representation is not correct. The principle of the act was the inability of the inhabitants of *Brighton* to provide for their own safety; whether right or wrong, I am not to inquire, but that is the paramount principle. It directs that an aid shall be given to all; which, in a certain way, is a charge upon each; and from which, therefore, a portion of them, the poorer, are exempted.

The information is filed at the relation of *Izard*, an inhabitant; and for the present purpose of deciding the validity

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validity of the demurrer, I must assume the allegations of the information to be true. The demurrer extends to the whole relief prayed, and if therefore to any single part it cannot hold, it is bad. Although, for instance, for one of the grievances stated, the relator has a remedy by replevin, and although a portion of the prayer is founded on that statement, yet if any other allegation entitles the relator to relief, the demurrer must be over-ruled. Upon what principle it can be contended, that it was not the duty of the commissioners to apply the surplus of the coal-rate in discharge of the debt contracted by works for resisting the encroachments of the sea, before any application in aid of the town-rate, seems to me incomprehensible; whether I am competent on this record to enforce the performance of that duty, is another question; but the information, stating the fact of the misapplication, to so much, whatever becomes of the rest, the defendants must answer.

It has been argued, that the commissioners are not amenable to the jurisdiction of a court of equity, in respect of transactions which, according to the allegations, constitute a crime at law; but let it be recollected, that a party accountable cannot protect himself from an account in this court, by the mere suggestion that the duty of accounting is blended with duties of another kind. The information contains a charge, which I must at present assume to be true, of misapplication of the funds, and on that the question again arises, what can be done here? (a)

(a) "As to what is said relating to this information, complaining of misapplication of the revenue by the governors, which is a misbehaviour they cannot correct, there is no weight in that objection; for there is no complaint of the governors applying any thing of it to their own use; no court of equity, therefore, would decree them to pay that money out of their own pocket backward, but will only regulate for the future, which is by removing those governors." (*Per* Lord *Hardwicke*. *Attorney-General*, v. *Middleton*, 2 *Ves.* 329.)

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It is impossssible to maintain that, admitting the truth of the allegation, the act of parliament has been duly executed. Can it be contended, that 4000*l.* ought to have been applied in reduction of the town-rate, while the debt not only remained unpaid, but was encreased by new loans? I assent to the doctrine of the Vice Chancellor, that the relator might have obtained redress by replevin, provided he could establish a case of illegal distress (*a*); but the statement of that fact by the Attorney-General will not deprive him of his right to relief on other grounds. In determining the validity of this demurrer, the Court is bound to consider the whole relief sought; because, if any part is due, the circumstance of having prayed too much, will not support a demurrer to the whole. (*b*) If, on the true construction of these acts, the commissioners can be considered in the sense in which I use the term, as trustees, putting out of the case all that has been done, except as inducements to the Court to look at the balance in hand, the information stating the existence of such a balance, the question would be, whether the Court has not jurisdiction to secure its due application for the purposes of the acts.

An action of replevin may be maintained for goods distrained under a warrant from commissioners authorized by act of parliament to levy rates for specific local purposes with power of distress.

If the Plaintiff is entitled to any part of the relief sought, a demurrer to the whole relief must be over-ruled.

(*a*) On this point see *Fenton* v. *Boyle*, 2 *Bos. & Pull. N. R.* 399., and the cases cited in *Pearson* v. *Roberts*, *Willes*, 672. n. b.

(*b*) "The rule of the Court is upon demurrer of the whole bill, where the demurrer covers more than it ought, the Court will not split and divide it, as it will a plea; for a demurrer is taken unfavourably, and therefore it will be over-ruled: but that does not deprive the party of his equity; for the same thing may be insisted on in his answer." *Per* Lord *Hardwicke*, Bishop of *Sodor and Man*, v. Earl of *Derby*, 2 *Ves.* 357. See Earl of *Suffolk* v. *Green*, 1 *Atk.* 451., and the cases cited by Mr. *Sanders*, n. 1., to which may be added, *The East-India Company* v. *Neave*, 5 *Ves.* 173. Mayor, &c. of *London* v. *Levy*, 8 *Ves.* 403. *Baker* v. *Mellish*, 11 *Ves.* 70. In some instances, however, a demurrer has been allowed in part, *Radcliffe* v. *Fursman*, 2 *Bro. P. C.* edit. *Toml.* 514. *Rolt* v. Lord *Somerville*, 2 *Eq. Ca. Ab.* 759. Lord *Redesdale*, Treat. on Plead. 174. And the demurrer of several defendants may be good as to one and bad as to another, Mayor, &c. of *London* v. *Levy*, 8 *Ves.* 404.

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One of the grounds on which this demurrer has been supported at the bar, is not necessarily connected with the fact that the suit is instituted by the Attorney-General; I mean, that the information calls for disclosure of acts which would constitute criminality in the Defendants: my answer is, that as to parts, the objection may prevail, but as to other parts it cannot; and the Defendants being competent, not only by demurrer, but by answer, to protect themselves from answering, the demurrer as to the whole information cannot be supported, because an answer is required to some questions tending to criminate, if an answer is required to other questions not tending to criminate. How would it be possible, were this an ordinary suit, to sustain, on such grounds, a demurrer to the whole relief?

I observe that it has been considered as mischievous for the Attorney-General to come in aid of the relator in this case, with respect to the distress; but if the relator is not allowed to require the assistance of the Attorney-General, yet it will not be the less necessary for the Defendants to answer the information in other parts: provided that the suit can be maintained by the Attorney-General, the circumstance of his joining as relator, a person who is not entitled to the equitable relief which he seeks, will not vitiate the proceeding; that point has been so determined in a late case before the House of Lords. (*a*)

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(*a*) The Court requires a relator, in order to secure to the Defendants costs in the event of the dismission of the information, (Lord *Redesdale, Treat. on Plead.* 18. 79. 1 *Ves.* 72. 2 *Ves.* 330. 1 *Ves. jun.* 247.); but where a decree of regulation is pronounced, though not in conformity with the prayer, so that the information has a foundation, costs are not given, (*Attorney-General* v. *Bolton*, 3 *Anstr.* 820.) The suit is not abated by his outlawry, (Lord *Redesdale*, 185. in the *Attorney-General of the Duchy of Lancaster* v. *Heath*, *Prec. in Cha.* 13., the relator sustained the character of Plaintiff, *ibid.* n. d.), or death, (Lord *Redesdale*, 79. *Waller* v. *Hanger*, 2 *Bulstr.* 134.); but the Court suspends farther proceedings until another relator is appointed, on the death, (Lord *Redesdale*, 79.; and see *Attorney-General* v. *Powell*, 1 *Dick.* 355.); or lunacy, (*Attorney-General* v. *Tyler*, 2 *Eden*, 280. 1 *Dick.* 378.

Lord

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The defendants then insist on a defect of parties. I am of opinion that that objection cannot prevail. On the contrary, it is apparent that if the information can be sustained at all, as the information of the Attorney-General; and if the acts complained of are the acts of the commissioners, they are the proper parties to the record. The circumstance that the acting commissioners of the time past may not be the acting commissioners during the progress of the suit, may, indeed, present a formidable obstacle to its successful prosecution; but, undoubtedly, as commissioners, they may be compelled to bring forward, from time to time, those accounts for which they were originally brought here; and the act having provided a mode in which their successors are to be appointed, when an injunction is required against the body so formed, the suit, if it can be maintained at all, may certainly be maintained against them. If the Attorney-General can sustain the information, the parties may from time to time be changed. That part of the case presents difficulties, but no objection to the progress of the suit. The argument that the treasurer should have been, in that character, the sole Defendant, is untenable; the directions in the act are not applicable to such a case as this, in which the relief sought could not have been granted against the treasurer.

We come then to the most material question, whether this is a case in which the Attorney-General can sue? On the best consideration, recollecting the judgment already pronounced, and expressing an opinion subject to review

Lord *Redesdale*, 23.) of a sole relator. No new relator can be introduced without the consent of the Attorney-General. (*Anon. Sel. Ca. in Ch.* 69.) It seems to have been held that the relator must have some, (*Attorney-General* v. *Oglander*, 1 *Ves. jun.* 246.) though a remote, (*Attorney-General* v. *Bucknall*, 2 *Atk.* 328.) interest in the subject of the suit; but the technical distinction between an information (with a relator) and an information and bill, (Lord *Redesdale*, 18. 78, 79. *Cooper, Treat. on Plead.* 106, 107.) appears to proceed on the opposite assumption.

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elsewhere,) and in order to teach us the delicacy of legislating on such matters, I shall not regret if this case is carried to a higher court,) I think that the Attorney-General may sustain this information. The first act authorizes me to say, that parliament interfered in favor of persons whose circumstances were such, that they could not, by their own means, support the town, and on that ground directed a sum to be levied and applied to the special purpose of erecting groyns for the preservation of the coast, it was, therefore, an aid given to a deficiency in the pecuniary circumstances of the inhabitants, who must submit to be considered as having represented themselves too poor to make this provision from their own funds. Parliament having by the first act appointed certain persons, under the denomination of trustees, to levy and apply specific sums, I repeat here, that if the question had occurred between the date of that act and 1810, it would have been impossible to contend, that the persons so appointed were any thing less than trustees, for the purpose of applying these sums; and although the act of 1810 renders it somewhat more difficult to adopt that construction, yet I say, that the two acts are *in pari materiâ;* and that though the commissioners are entitled, under the last act, to raise a larger sum, they are so entitled in precisely the same character of trustees, and for the same purposes, as were expressed in the first act; namely, for the benefit of the poor inhabitants of *Brighton.*

On this question the Court has been referred to the treatise on the Law of Charitable Uses, by *Duke,* which I have always heard quoted as a book of high authority: it contains the readings of a man of great eminence in his profession; and I believe that the passage cited was a construction of the act by the very individual who drew it. The question comes to this, whether here is a charitable use; a grant within the terms of the statute of *Elizabeth?*

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beth? (a) If it is, *cadet quæstio.* On the words of the statute the following commentary is extracted from the readings of Sir *Francis Moor:* "Ports and havens; such only as tend "to safety of ships of sail, not other vessels; and creeks "for harbour, which are implied to find lights to guide "ships into the haven is a charitable use within these "words. An imposition granted upon commodities im- "ported or transported, to be employed upon repair of "ports or havens, where they shall land, is a charitable "use, and within this statute." (b)

I should be glad to know whether an impost in aid of the poor inhabitants of *Brighton* to repair groyns for the preservatiou of the town, and enabling ships to land goods there, is not within the terms of this construction of the statute? I have heard nothing which prevents my concurring in the opinion, that a parliamentary grant, destined to such purposes, is a gift to charitable uses. If that doctrine is to be contradicted, it must be done by higher authority than mine.

Demurrer over-ruled.

Reg. Lib. A. 1817. fol. 767.

From this decision the Defendants appealed to the House of Lords, but before a hearing the parties compromised, the relator consenting to dismiss the information, on payment of costs, as between attorney and client.

(a) 43 *Eliz.* c. 4. (b) *Duke*, p. 135.

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PREBBLE *v.* BOGHURST.

1816. *March* 19. 1818. *April* 25. *May* 2. 4. *June* 2. 9.

The LORD CHANCELLOR.

Sir RICHARD RICHARDS, Knight, (Lord Chief Baron.)

Sir CHARLES ABBOTT, Knight, (now Lord Chief Justice).

J. P., on his marriage with *M. T.*, executed a bond in the penalty of 2000*l.*, with condition to be void if, in the event of *M. T.* surviving *J. P.*, his executors, &c. should, within three months after his decease, pay to trustees 1000*l.* in trust for *M. T.*, and if, in the event of *J. P.* surviving *M. T.*, and there being any child or children of the marriage living at the decease of *J. P.*, his executors, &c. should, within three months after his decease, pay to trustees 1000*l.* in trust for such child or children; "and farther if *J. P.* should, at any time during his natural life, become seised of any messuages, &c. in possession, and should settle the same upon *M. T.* and the issue of the said intended marriage, by such good conveyances in the law as counsel should advise, in such parts and proportions, and to such use and uses, as should be thought requisite, the better to make a provision for *M. T.* in case she should happen to survive *J. P.*;" after the death of *M. T.*, *J. P.* having married again, and then, and not before, become seised of real estates, and having at his death left issue by both marriages, all the real estates of which he became seised during his life were subject to the obligation, and settled on the issue of the first marriage as tenants in common in fee.

BY a bond dated the 10th of *August*, 1768, executed in contemplation of marriage with *Mary Townsend*, *John Prebble* bound himself, his heirs, executors, and administrators to *Hans Sloane* and *John Tilden*, their executors, administrators, and assigns, in the penal sum of 2000*l.* The bond recited the intended marriage, and that *John Prebble* was to receive, on or before the day of marriage, the sum of 200*l.*, and that *Mary Townsend* was also possessed of or entitled to a very considerable share or moiety of the personal estate of *Thomas Townsend* her late father, which would come to her immediately after the decease of her mother *Mary Townsend* the elder; and that in consideration thereof, and of the affection which *John Prebble* bore towards *Mary Townsend* his intended wife, and for making a provision for the said *Mary Townsend*, and the issue of

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the said intended marriage, in case the same should take effect, *John Prebble* had agreed, not only to pay such sums of money to such persons, and at such times as therein mentioned, but that if at any time during the term of his natural life he should be seized of any messuages, tenements, lands, and hereditaments in possession, he would by such good conveyances in the law as counsel should advise, settle the same upon *Mary Townsend* and the issue of the intended marriage, in such parts and proportions, and to such use and uses, as should be thought requisite, the better to make a provision for her in case she should survive the said *John Prebble*; and the condition of the bond was, that if the said intended marriage took effect, and *Mary Townsend* should survive *John Prebble*, then if the heirs, executors, administrators, or assigns of *John Prebble* should, within three months next after his decease, pay to *Sloane* and *Tilden*, their executors, &c. 1000*l.* in trust for *Mary Townsend*, her executors, &c. for ever; and also if the said intended marriage took effect, and *John Prebble* should survive *Mary Townsend*, and there should be any child or children of the said intended marriage, living at the time of the decease of *John Prebble*, then if the heirs, executors, administrators, or assigns of *John Prebble* should, within three months next after his decease, pay to *Sloane* and *Tilden*, their executors, &c. 1000*l.*, in trust to pay and dispose of the same unto and among all and every the son and sons, daughter and daughters, of the said intended marriage, in equal shares and proportions, if there should be more than one, and if but one, then wholly to that one, at their respective age or ages of twenty-one years, and in the mean time, to pay and apply the interest and proceeds arising from the said sum of 1000*l.*, for the use of such son and sons, daughter and daughters, equally if more than one, and if but one, then wholly to that one; and farther that if the said intended marriage took effect, and *John Prebble* should, at any time during his natural life, become seized of any messuages, tenements, lands, and heredita-

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ments in possession, and should settle the same upon *Mary Townsend* and the issue of the said intended marriage, by such good conveyances in the law as counsel should advise, in such parts and proportions, and to such use and uses, as should be thought requisite, the better to make a provision for *Mary Townsend* in case she should happen to survive *John Prebble*, then the obligation should be void.

The marriage was solemnized, and in 1776 *Mary Prebble*, formerly *Mary Townsend*, died, leaving several children of the marriage. During her life, *John Prebble* did not become seised of any real estate. In 1782 he contracted a second marriage with *Ann Day*, and after that time became seised in possession of considerable real estates. On the 19th of *December*, 1812, *John Prebble* died, leaving issue by his second wife, in favour of whom he, by his will and codicils, disposed of the greater part of his property.

The bill filed by the children of the first marriage, against the children of the second marriage, the widow, and other persons claiming under a settlement executed in contemplation of that marriage, or under the will and codicils, prayed, that the defendants, the devisees in trust, might set forth a list and description of the freehold, copyhold, and leasehold messuages, &c. of which *John Prebble* was, at any time during his life, seised in possession, and what is become thereof, and of which of the said estates he died seised in possession, and also a list and description of all title-deeds and other evidences in their custody or power relating to the same; and that the condition of the bond might be specifically performed, and all the freehold and leasehold messuages, &c. of which *John Prebble* died seised in possession, be settled pursuant to such condition; and that an account might be taken of the rents and profits of all the said messuages, &c. received by, or come to the hands or use of, the devisees in trust, and that what should appear due on taking such account might be paid to the

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Plaintiffs; and that the Plaintiffs might be declared entitled to the said 1000*l.* with interest, after three months from the death of *John Prebble;* and that it might be referred to the Master to inquire what freehold, copyhold, and leasehold messuages, &c. of which *John Prebble* was seised in possession at any time during his life, had been sold and disposed of by him, and at what price, and what would now be the value of the same, and to compute interest on such value from his death; and that the Plaintiffs might be declared entitled to have paid to them the said value and interest, or that the same might be invested in the purchase of freehold estates to be settled as aforesaid; the bill also prayed an admission of assets, or an account of the personal estate, &c.

1816. *March* 19.

On this day the Plaintiffs moved for a receiver.

Sir *Samuel Romilly*, Mr. *Hart*, Mr. *Bell*, and Mr. *Wakefield*, in support of the motion, insisted on the clear construction of the bond, as affecting all the real estates of which the obligor became seised during his life; and on the right of the Plaintiffs to have the rents secured, subject to the jointure of the second wife.

Sir *Arthur Piggott*, Mr. *Leach*, Mr. *Roupel*, and Mr. *Wingfield*, against the motion, contended, that the bond affected those estates only which were acquired during the coverture, as in *Cusack* v. *Cusack* (*a*); that on the Plaintiffs' construction, the agreement was unreasonable; and that the Court would not, in the absence of fraud, disturb the legal possession of the trustees. *Lloyd* v. *Passingham.* (*b*)

The LORD CHANCELLOR.

This agreement, having been distinctly entered into, and on the consideration of marriage, is such as, when

(*a*) 5 *Bro. P. C.* 116. edit. *Toml.* (*b*) 16 *Ves.* 59.

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its meaning is once ascertained, a court of equity will enforce. If there has been a breach of the bond at law, the Plaintiffs are entitled to relief in equity; but they have no title in equity, if there has been no breach at law. The principal question therefore is, whether the omission to make a settlement of estates purchased after the death of the wife, is a breach of the condition of the bond? On that question, it will be proper to obtain the opinion of a court of law. As to the particular object of this motion, if the trustees consent to pay the rents and profits into Court, I shall not appoint a receiver. (*a*)

Pending a question, whether estates devised were subject to a bond executed by the testator, for making a settlement on his wife and children, the Court refused to appoint a receiver, the devisees in trust consenting to pay the rents into court.

At the hearing, the Lord Chancellor directed a case for the opinion of the Judges of the Court of Common Pleas, on the question whether *John Prebble*, not having become seised of any real estate during the continuance of the first marriage, committed a breach of the condition of the bond, by not making a settlement of the estates of which he afterwards became seised in possession, on the issue of that marriage. (*b*)

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(*a*) From Mr. *Merivale*'s note.

(*b*) " 19th *March*, 1816. His Lordship doth order, that a case be made for the opinion of the Judges of the Court of Common Pleas; and it is ordered, that there be stated in such case, the bond in the pleadings in this cause mentioned; that during the marriage in the said bond mentioned as intended to be had, and which was afterwards had, the obligor therein, *John Prebble*, did not become seised of any messuages, tenements, lands, and hereditaments in possession; that the wife died in the lifetime of the said *John Prebble*, leaving children of such marriage, who are now living; that after her death, the said *John Prebble* married again, and had issue several children of his second marriage, who are now living; and after the said second marriage he became seised of an estate called *Blackacre* in possession; and it is ordered that the question therein be, whether, according to the true intent and meaning of the condition of the said bond, the said *John Prebble* would commit a breach of such condition, if he did not make a settlement of the estate called *Blackacre* upon the issue of the first marriage, according to the condition of the said bond; and it is ordered that the said Judges be attended with such case: and it is ordered that it be referred to Mr. *Stephen*, one of the Masters of this court,

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The Court of Common Pleas certified in the negative. (a) The Lord Chancellor not being satisfied with the certificate, the question was now argued before his Lordship, in the presence of the Lord Chief Baron, and Mr. Justice *Abbott.*

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April 25.

Sir *Samuel Romilly*, Mr. *Hart*, Mr. *Bell*, and Mr *Wakefield*, for the Plaintiffs.

The question arises on the construction of the bond executed by *John Prebble*, on his marriage with *Mary Townsend.* During the continuance of that marriage, he had no real estate; but his first wife having died in his life, he married again, and afterwards became seised of considerable real estates, some of which he sold, and continued in possession of others, to the value of 30,000*l.*, till his death. On that event, the bond, which had been before unknown in the family, was discovered, and the consequence of that discovery, is the present suit. It is contended, by the Plaintiffs, that the obligor was absolutely bound to settle all the real estate of which he became seised during his life; by the Defendants, that the obligation was limited to the real estate of which he became

court, to settle such case if the parties differ; and after the Judges shall have made their certificate, such farther order shall be made as shall be just: and in the mean time it is ordered, that the Defendants, the said devisees in trust, *Philip Boghurst*, *James Taggart*, *Christopher Prebble*, and *Ann Prebble*, do pay to the said *Ann Prebble* the yearly sum of 60*l.*, secured to her by the settlement in the pleadings mentioned, made and executed previous to her marriage with the said *John Prebble*, out of the rents and profits of the freehold and copyhold estates of the said testator, now in their or any of their hands, or hereafter to be received by them or any of them; and it is ordered that they do pay the residue of such rents and profits now in their hands, or hereafter to be received by them or any of them, as the same shall be received by them or any of them, the amount to be verified by affidavit, into the Bank, with the privity of the Accountant-General of this Court, to be there placed to the credit of this cause, subject to the further order of this Court." Reg. Lib. B. 1815. fol. 940.

(a) *Prebble* v. *Boghurst*, 7 *Taunt.* 588.

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seised during the continuance of the first marriage, and to the event of the survivorship of the wife.

The strict construction of the bond is clear in favor of the plaintiffs. The condition contains three distinct provisions: first, in the event of the wife surviving the husband, it directs payment of 1000*l.*, on certain trusts, for the benefit of the wife; secondly, in the event of the husband surviving the wife, it directs payment of the like sum on other trusts, for the benefit of the issue; then follows the third clause, which is an absolute engagement, not dependent on any condition of survivorship, that all the real estate of which the husband should at any time during his natural life become seised, should be settled upon the wife and the issue of the marriage. The words which ensue, "the better to make a provision for the said *Mary Townsend*, in case she should happen to survive *John Prebble*," may be understood, not as restraining the provision to the event of the wife's survivorship, (a construction which would exclude the issue,) but as expressive of one object of the provision. There is a substantial reason for the insertion of these words, which at first seem useless, namely, to express that the provision was designed for *Mary Townsend*, when she became a widow, not in the nature of pin-money, while she remained a wife. The preceding pecuniary provisions are contingent on survivorship; the agreement for a settlement is absolute at the moment of marriage: the Court cannot insert words of contingency for the purpose of excluding the issue. It is the office of a recital to explain the operative part of a deed when obscure, not to control it when clear. The Court is not authorized to alter the express terms of the condition, by reference to a supposed design to provide for the children, only in the event of the survivorship of the wife, and by a settlement under which she might take a benefit.

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The other construction for which the Defendants contend, that the clause shall apply to those estates only of which the husband became seised during the joint lives of himself and his wife, offers farther violence to the terms. On what principle can the Court, in contradiction to the obvious meaning, expunge the words "at any time during his natural life," and substitute "during their joint lives?" All his real estate, without exception, is evidently comprehended within the literal import of this clause; and to limit the period of seisin to the coverture, would be, not to construe but to contradict it.

The meaning of the instrument being clear, it is needless to vindicate the intent; the construction of the Plaintiffs, however, does not prevent a provision for a second family: the operation of the bond is confined to real property; his whole personal estate remained under the absolute control of the obligor.

The *Solicitor-General*, Sir *Arthur Piggott*, Mr. *Roupel*, and Mr. *Wingfield*, for different Defendants.

The case presents no grounds to justify a dissent from the unanimous opinion of the Court of Common Pleas.

On the strict construction of the bond, no settlement of real estates was to be made, unless the wife survived the husband. The express direction is, that a settlement shall be made, the better to provide for the wife in case she should happen to survive; the settlement intended, is, therefore, one by which some benefit is secured to the wife: a settlement made after her death, in which she could never have an interest, cannot be comprehended within this description.

The agreement, so understood, discovers a consistent and rational design. The sum of 1000*l.* is secured in all events,

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on the death of the husband, to the wife, if she survives, or if she is dead, to the children. The provision for making a settlement is framed in contemplation of two distinct contingencies; if the husband died, leaving his wife surviving, a moral obligation attached on him to provide for his widow and for her children, (by the supposition there could be no subsequent marriage, and therefore no other children,) and in discharge of that obligation, this agreement secures all his real estate for their benefit. In the event of surviving his wife, he meant to reserve to himself the discretion of providing for the children of that marriage, as subsequent contingencies, including a second marriage, and the birth of a new family, might render just and expedient; and in that case, therefore, this agreement imposes no obligation. The policy of a settlement so framed is obvious, and may be advantageously contrasted with the intention, imputed by the opposite construction, of securing the whole real estate for the benefit of the offspring of the first marriage, to the exclusion of all future claims, however imperious.

In support of so just and reasonable a design, the Court would resort, if needful, to the principle constantly established from the earliest times (*a*), recognized by Lord *Coke* (*b*), and adopted in subsequent decisions (*c*), of construing the condition of a bond favorably to the obligor, in order to relieve him from the penalty. The amount of that penalty affords some evidence, that it could not be intended to secure the settlement of all the real estate of which the obligor might become seised, at any time during his life.

(*a*) 14 *H.*4. 19. *a.* (*b*) 5 *Co.* 21. *b.*

(*c*) " A single obligation is always taken most in advantage of the obligee and against the obligor; but it is otherwise of the condition of an obligation; for this is always taken most in advantage of the obligor, and against the obligee." *Shephard*'s Touchstone, ch. 21. And see *Butler* v. *Wigge*, 1 *Saund.* 65., and the cases cited by Serjeant *Williams*, p. 66. *a.* n. 1.

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It strikes me, that the argument in the Common Pleas did not unfold all the difficulties of the case. The bond, with this condition, was executed in contemplation of marriage, and there is no doubt that it constitutes an agreement, which courts of equity will perform. (*a*) It was not on that question, that I desired the opinion of the court of law, or of the Judges who now assist me; but on this, whether, according to the true intent and meaning of this bond, an estate, call it *Blackacre*, of which the husband became seised after the death of the wife, is subject to the obligation? The question, whether the bond is forfeited and the penalty to be raised, is proper for a court of law, but equity, considering the bond as an agreement, the doubt there would be, whether the obligee should have performance or compensation? At present, the simple question is, whether *Blackacre* is affected by the condition? It strikes me thus: The obligor on the marriage was to become entitled to 200*l.* absolutely, and also to a moiety or share of the personal estate of his wife's father, on the death of her mother: what was his interest during the

(*a*) "Where penalties are inserted in a case of non-performance, this has never been held to release the parties from their agreement, but they must perform it notwithstanding." *Per* Lord *Hardwicke*, *Howard* v. *Hopkins*, 2 *Atk*. 371. And see *Chilliner* v. *Chilliner*, 2 *Ves*. 528. *Hobson* v. *Trevor*, 2 *P. Wms*. 191. 10 *Mod*. 517. *Str*. 533. *Holtham* v *Ryland*, *Nels*. 205. *Anon*. *Mos*. 37. The rule being, that the penalty is not to be considered as of the essence of the contract, *Magrane* v. *Archbold*, 1 *Dowe*, 107. But if, on a construction of the whole contract, it appears, that the stipulated sum was designed not as a penalty, but as liquidated damages, a court of equity will not relieve against the payment. *Roy* v. *Duke of Beaufort*, 2 *Atk*. 194 *East India Company* v. *Blake*, *Finch*, 117. *Small* v. *Lord Fitzwilliams*, *Prec. in Ch.* 102. *Ponsonby* v. *Adams*, 2 *Bro. P. C.* edit. *Toml*. 431. *Rolfe* v. *Peterson*, ibid. 436. *Low* v. *Peers*, 4 *Burr*. 2228, 2229. *Astley* v. *Weldon*, 2 *Bos. & Pull*. 346. *Street* v. *Rigby*, 6 *Ves*. 818.; nor, as it seems, enforce the performance of the agreement, for the breach of which the parties have provided this specific remedy. *Woodward* v. *Eyles*, 2 *Vern*. 119. *Street* v. *Rigby*, 6 *Ves*. 818. And see 1 *Fonbl*. Treatise of Equity, 151, 152. *n*., on the principle that that provision is an essential term of the contract.

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coverture in this part of the property, does not appear; and it is unnecessary to state here, what he could or could not have done with it. A part of the consideration, besides these pecuniary benefits is marriage. I do not apprehend that the quantum of pecuniary benefit will affect the question; and I am surprised to find observations about the amount of the penalty as varying the reciprocity (*a*), where marriage is one of the considerations. An obligation to make a settlement on the wife and the issue, clearly includes an obligation to make a settlement on the issue after the death of the wife. The obligor, undertaking to make a settlement on his wife and issue, engages, first, if the wife survives him, to pay 1000*l.* for her use; and so far there is no provision for the children, either from this fund, or from the moiety of her father's estate, to which the wife was entitled at the death of her mother; he then adverts to the contingency of his wife dying in his life leaving children; and providing that in that case the sum of 1000*l.* shall belong only to the children, he proceeds to state in what shares it shall be distributed among them; he then takes into consideration estates of which he might become seised. It is clear that this bond would not embrace copyhold or leasehold, and left it entirely in the option of the obligor, whether he would ever acquire seisin; and unless, therefore, freehold property devolved to him, independently on his own act, so that he could be said to have become seised, the condition would never take effect except by his instrumentality. Having before recited, that his intention was to provide, not for his wife only, but for his wife and children with respect to all the subjects of provision; and having first mentioned the contingencies of their respective survivorship, he proceeds to undertake, that if he shall become seised of any real property, he will settle it in such parts and proportions; the word "such" having reference to something which

Where marriage is one of the considerations, the amount of pecuniary consideration is immaterial.

An obligation to make a settlement on the wife and the issue, includes an obligation to make a settlement on the issue after the death of the wife.

A bond executed on the marriage of the obligor, conditioned to settle lands, "if he should become seised in possession," affects freehold only.

(*a*) 7 *Taunt.* 543.

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had preceded with respect to proportions. He then recollects that the previous directions are not sufficient for this case, except in the event of the death of the wife during his life; that if she should survive, she would become entitled to the whole of the 1000*l.*; but his intention being, that the real estates should in every event be a joint provision for the wife and the children, he therefore introduces the words, to such use and uses as may be thought proper, the better to make a provision for the wife; terms which may denote a design to secure to her a partial, and only a partial, interest in the real estates. The question may be thus stated, whether on the whole he did not mean, that if his wife survived, she should have 1000*l.*, which in the event of her death during his life should devolve to the children; that the lands should be settled, if she did not survive, entirely on the children, but in the event of her surviving, to such uses as would secure to her a proper share.

I entertain no doubt, that the decision of the Judges of the Common Pleas was founded on an opinion that, according to the true intent and meaning of the bond, there would be no breach, unless there had been a non-conveyance of lands of which the obligor had become seised during the life of his wife; and I think that they meant to mark that, by the insertion in the certificate of the words, "the said *John Prebble* having survived the said *Mary Prebble*, formerly *Mary Townsend*." (*a*) On the original hearing of the cause, little was said: when it came from the Common Pleas, I should have felt great relief, could I have acceded to the opinion of the Judges; but I thought, and still think, that the case requires farther consideration; and it is clear, that this Court is not bound by the certificate of the Court of law.

(*a*) 7 *Taunt.* 546.

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The obligation, as collected from the condition, is three-fold; the first two acts are to be performed, not in the life of the obligor, but by his representatives after his decease. Contemplating two contingencies, of his wife surviving him, or dying in his life, he stipulates, that in the first event, she should have 1000*l.*, of which the issue would not participate; that in the other event, the issue should have 1000*l.* of which she would not participate; he then adverts to the real estate of which he might become seised, (any real estate which he then had would not be comprehended in the clause, for the words are, "if he shall become seised,") and undertakes to settle it on the wife and the issue, as counsel shall advise. Had it proceeded no farther, the circumstance of his having covenanted to convey to her and her issue, would not have been the ground of a necessary inference, that unless she survived, there should be no conveyance to the issue. That is not the construction. The doubt is, whether the subsequent words are intended only to secure a provision for her in case she survived him, or whether they are to narrow the benefit which the issue would take if the clause had stood without them, and reduce their claim to the estates of which the obligor became seised before her death, limiting the extent of the phrase "during his natural life" to such part only of his natural life as passed during the coverture. On the point, whether there is a breach of the condition, the construction is the same at law and in equity; but if a breach is established, the form of conveyance will remain to be determined, and the considerations may be different. The question for the opinion of the learned judges is, whether the obligor, on the death of his first wife, having married, and then and not before, become seised of real estates, and having died without making a settlement of those estates in favor of the issue of the first marriage, has committed a breach of the condition?

A bond, conditioned to settle lands, "if the obligor shall become seised," will not affect lands of which he is seised at the date of the bond.

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May 2.

ABBOTT, JUSTICE.

This case, my Lord, has arisen upon a bond executed by *John Prebble*, upon his intended marriage with *Mary Townsend*. The marriage took place, and there were issue of the marriage, and the obligor *John Prebble*, after the death of his wife *Mary Townsend*, but not before, became seised of an estate in fee in possession, called *White Close*, and died without making any conveyance thereof, in favor of his issue by *Mary Townsend*; which issue survived the obligor, the obligor having in fact, after the death of *Mary Townsend*, married a second wife, and left issue by that marriage also; and the only question upon which I understand your Lordship to desire the opinion of my Lord Chief Baron and myself is, "whether "attending to the legal construction of the condition "of the bond, the obligor committed a breach of that "condition." And upon that question, after considering the case, and attending to the very full and able discussion, that the matter has received in this court, I am of opinion, upon the facts before mentioned, that the obligor did commit a breach of that condition.

I have not formed this opinion without some reluctance, because I am aware that I differ from the very learned Judges of the Court of Common Pleas. I hope, however, that I shall not have the further misfortune of being found to differ from my Lord Chief Baron and your Lordship. The terms of the bond, upon which the question arises, have been so recently before your Lordship, that I do not think it necessary to trouble you with a detail of them, but shall proceed at once to mention the grounds and reasons of the opinion that I have formed. I think the second marriage of the obligor, and the birth of issue of that marriage, are facts not material to the question proposed. I conceive the answer to the question must depend

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pend only upon the words of the bond, and the intent of the obligor, as it may be collected from the words; and must be the same in the present state of facts as it would have been if there had been no second marriage, or no issue of such second marriage. There is no allusion to a second marriage in the bond. It is probable that the obligor did not, when he executed this bond, contemplate a second marriage; in fact, I believe a second marriage is very rarely thought of by those who are about to contract a first. And if these facts are immaterial to the question, the topic of hardship, which was much urged at the bar, by some of the learned counsel for the issue of the second marriage, must be excluded from our consideration. Indeed, it would be very easy to suppose a state of facts in which such a topic might have been urged, with at least equal propriety, on the part of the issue of the first marriage, if I am not mistaken in the construction of this instrument; and perhaps it might be so, even upon the state of facts now before the Court.

Now, as to the construction of the bond itself, this instrument manifests a general intention to provide for the intended wife, *Mary Townsend*, and her issue, and to do this in two modes; first, by the payment of a specific sum of money, viz. 1000*l.* to the obligees and trustees; and secondly, by the settlement of real estate, if he should ever become seised of any such in possession: but whether the settlement of such real estate was to depend upon the contingency of her survivorship, and the fact of the seisin taking place during her life, is the question. Payment of the 1000*l.* is certainly not to depend upon the contingency of her survivorship; that contingency only regulates the trust to which the 1000*l.* shall be applied. It is to be applied to her use absolutely if she survives, whether there be or be not issue of the marriage. If she dies before him, and he dies leaving issue, it is to be applied to the use of their children. These two events are made the subject of two distinct clauses, which might well be done,

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because the contingency would cease before the payment was to be made. The condition of the bond then proceeds to provide for a settlement of real estate, if he shall ever become seised of any. And this is done by a single clause, which begins by mentioning the whole period of the natural life of the obligor, as the period of his becoming seised, and it provides, that if the marriage shall take effect, and he shall at any time during his natural life become seised of any messuages, &c. in possession, he shall settle the same upon *Mary Townsend*, and the issue of the

If nothing further had been introduced, but the words, "then the bond shall be void," had followed immediately, I conceive it to be unquestionable that the bond would have been forfeited, if the obligor had died before his wife without issue, and had not settled the real estate upon her; or if he had survived her, and died leaving issue by her, and had not settled the real estate upon their issue; or if he had died first, leaving both her, and issue by her surviving, and had not settled the real estate both upon her and their issue, (always assuming that he had acquired any such in possession). If, however, nothing further had been added, it might be matter of doubt and controversy, in what way the settlement should be made, whether the whole should be settled after his decease, upon the wife for life, with a remainder to the issue, or jointly upon her and the issue, or even in such a way as to give her some beneficial interest during the life of the obligor. And to obviate these doubts, and others of the like nature, and for no other purpose, as it seems to me, and to shew that the wife was to have no interest during his life, but was to have a substantial, and not a merely nominal, interest after his death, if she should be the survivor, the subsequent words are introduced; providing expressly for such a division of the estate, and such a declaration of uses, as should be thought requisite, the better to make a provision for her in the event of her becoming the survivor;

vivor; an event that might be uncertain at the instant when it might be necessary to execute a settlement, in order to guard against a possible forfeiture of the bond, by his sudden death. And I think the contingency of her survivorship, which comes to be mentioned at the end of the clause, refers only to the shares and uses, that is, to the mode and form of the settlement, supposing him to have become seised during her life, and does not govern the whole clause, and make the necessity of any settlement at all to depend upon the contingency of his becoming seised during her life-time. A construction that should make the whole clause to depend upon this event, would render it necessary to narrow the words, "at any time during his natural life," and to construe them to mean only, at any time during the joint lives of himself and his wife; whereas, these latter words are so obvious, that I think they must have occurred to the obligor, if his meaning had been conformable to them. On the other hand, the construction which I think ought to be put upon this instrument, gives effect to every part of the clause, by requiring the obligor to settle all that he should at any time acquire, but to settle it in such a way, that is in such shares, and to such uses, as would make a suitable provision for her, if he should become seised before her death, and she should be the survivor, and not allow in that event, of a merely formal and fallacious settlement upon her, giving every thing short of the entire beneficial interest to her issue.

For these reasons, my Lord, I am of opinion, upon the facts proposed, that the obligor did, according to the legal construction of the condition of this bond, commit a breach of that condition. All which, I submit to your Lordship's judgment.

Richards, Chief Baron.

Concurring in the opinion of my learned brother, and in the reasons which he has assigned, I shall not detain the

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Court by examining the question at length. From the recital it is clear that the intended husband agreed to provide for his wife and the issue of the marriage; the object was to make a provision for both; and there can be no doubt that the issue are in this court entitled to be considered as purchasers of every thing which, according to the true construction, was intended for them, by this condition. He then recites an engagement, that if he should become seised of real estates during his natural life, not during their joint lives, he would settle them by such conveyances as counsel should think necessary, not such as he should choose, (and in default of counsel, a court of equity would decide what is proper,) in such parts and proportions as should be thought requisite; when counsel, or the Court in defect of counsel, has decided the proper settlement, that share, whatever it might be, which was intended for the wife, was clearly intended the better to make a provision for her in case she survived him: in that event the children are entitled to no provision from the sum of 1000*l.* The amount of the penalty, on which some stress was laid, cannot assist the construction; because in all events 1000*l.* must be paid, and a penalty of 200*l.* is not sufficient to secure that payment.

The condition follows the words of the recital, not confining the seisin to any period shorter than his life; and it seems to me that the construction which I have taken the liberty of putting on the words in the recital, must be the construction of the same words in the condition. I think that they mean only a mode of distributing the estate as counsel or the court shall think proper, the wife taking a share in the event of her surviving. This argument seems to me conclusive in favor of the construction which my learned brother has put on this instrument. It was admitted in the discussion, that any estate acquired by the obligor during the coverture would have been subject to the obligation. I see no ground for the distinction suggested. We cannot advert to the facts of the case as they

have

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have since occurred; but the consequence must have been the same had the obligor exhausted all his personal estate, and left the issue of the second marriage without hope of provision. No words in the instrument authorize a distinction between estates acquired during the coverture, and estates acquired after its determination.

To your Lordship's judgment I submit this conclusion, at which I have arrived not without anxiety, feeling the respect due to the high authority which has already pronounced a different decision.

The LORD CHANCELLOR.

In this case the first question which it became necessary to determine was, whether there had been any breach of the condition of the bond; a question on which this Court is competent to declare an opinion, but which must be dealt with in the same way in equity as at law, and which I, therefore, took the benefit of sending to a court of law. It must be assumed that the Judges of the Common Pleas entertained an unanimous opinion, that the condition of the bond affected such lands only of which the obligor became seised during the coverture; the question is, whether they were right in that construction, or whether the condition did not impose an obligation to settle all the lands of which the obligor should be seised during his natural life? In the anxious office of deciding between the discordant opinions of six most able and learned Judges, I think it due to the parties to pause and weigh the reasons on both sides, before I give judgment.

May 4.

The LORD CHANCELLOR.

The question on which, in the discharge of my duty, I am now to pronounce an opinion, amid the discordance of high authorities, is, whether the obligation of this bond is confined to lands of which *John Prebble* became seised

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during the continuance of the marriage, on the solemnization of which it was executed, or extends to all lands of which he became seised during the term of his natural life. The question must depend on the terms of the bond. The amount of the penalty (which I observe the Lord Chief Baron conceived to be 200*l.*, but which is in fact exactly double the stipulated sum of 1000*l.*) is, I think, quite immaterial; because the penalty seems to have no relation in point of computation to the value of the lands. Marriage bonds being considered in this court as agreements, the question is, what lands are affected by the agreement contained in the condition? The stipulation relative to the sum of 1000*l.* has not provided for any act to be done in the life of the obligor; it provides first for an act to be done by his representatives, three months after his decease; namely, payment of 1000*l.* for the sole use of the wife, if she shall survive; and it then provides for another act to be done by his representatives, three months after his decease, in case the wife shall not survive, but there shall be at his decease one or more child or children, namely, payment of 1000*l.* for the use of the children. It is farther to be observed that, in this part of the condition, there is an express contemplation of the coverture ceasing, by the obligor's surviving, or by his predeceasing, his wife; so that the duration and the determination of the coverture are explicitly recognized in both those cases, the case of his surviving her, and of her surviving him. These two provisions are followed by the words on which the doubt arises; and it must not escape attention, that though he had been speaking of the determination of the coverture in both ways, by his death, and by her death, if he meant that the subsequent clause of the condition should refer to the period of coverture, he at least omitted to introduce any words relative to its duration, unless the conclusion of that clause is to be understood as affecting the beginning. The obligor must be taken to say, "If my wife dies during

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my life, my children shall have 1000*l.*; if I die in the life of my wife, she shall have 1000*l.*;" and having so provided in the event of the determination of the coverture, the condition proceeds, "and further, that if the said intended marriage took effect, and *John Prebble* should at any time during his natural life become seised of any messuages, tenements, lands, and hereditaments in possession, and should convey, settle, and assure the same on *Mary Townsend*, and the issue of the said intended marriage, by such good conveyances in the law as counsel should advise." Had it stopped there, no doubt could exist: the question is, whether the succeeding words so qualify the introductory words relative to his being seised during his natural life, as to shew that the obligation is confined to lands of which he was seised during the coverture; or whether these words are to have their natural construction.

The case has been represented by the Defendants as a case of hardship; the issue of the first marriage claiming all the lands of which the obligor became seised during the second coverture, as subject to the obligation, or, to give it another name, the agreement: but, unless hardship arises to a degree of inconvenience and absurdity so great that the Court can judicially say, Such could not be the meaning of the parties, it cannot influence the decision. The question might have arisen without a second marriage; supposing the husband to have continued a widower, and purchased lands; the wife, being dead, could have had no benefit, and the contest, on his death, would have been between the eldest son and the younger children. It is impossible to deny, that in many cases, the parties to marriage agreements, not adverting to a second, devote their whole fortune to the children of a first, marriage. In this case, if the wife had survived, the children would have taken no pecuniary provision, and the obligor might have disposed

On the question of executing an agreement, hardship cannot be regarded, unless it amounts to a degree of inconvenience and absurdity, so great as to afford judicial proof that such could not be the meaning of the parties.

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disposed as he pleased of the fortune of his first wife; might have given it to the issue of the second marriage. He had also a power, by very little providence in the mode of acquisition, to exclude from the operation of this obligation all property which he should acquire by purchase in the ordinary sense of that term; for it clearly included no estate of which he did not become seised.

It has been insisted, that the words which introduce the covenant relative to lands are to be restricted, that their natural meaning is to be denied to them, and the obligation which the obligor has incurred, relative to any lands of which he might become seised during his life, is to be confined to lands of which he should become seised during the coverture; or, in other words, to lands, the benefit of which the wife might have had. Considering the whole instrument, I cannot assent to the opinion that the latter is the true construction. First, the recital is, that the husband shall make a provision for the wife and the issue. With respect to the money provision, which is intended in one event for the wife entirely, and in another event entirely for the children, the word "and" must be construed "or"; that provision refers not to any act to be done during his life, and supposes, therefore, an express contemplation of her surviving him in the first instance, and of her not surviving him in the second; or in other words, the express consideration what shall be done in one case, within three months after the coverture shall cease, and in the other, within three months after his natural life shall cease. Then is introduced the provision with respect to the lands; an explicit engagement, that if, at any time during his natural life, the husband shall become seised of lands, those lands shall be settled for the benefit of the wife and issue. It is not and could not be contended, that if the wife had died before the settlement, the children would not have been entitled; but then follows the expression, the better to make a provision for the wife in

"And" construed "or."

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in case she should survive. Here, again, he adverts to the circumstance, that his death may terminate the coverture during her life; must I not consider that he had contemplated the opposite event? The question is, whether the obligor did not mean, as to the money provision, that in one event it should go wholly to the wife, in another wholly to the children, but that the lands should not go wholly to the wife in one event, or wholly to the children in another, but that each should take in certain proportions? Whether, intending the money entirely for one in one contingency, and entirely for the other in another contingency, he did not intend that the lands should be for the benefit of both, so far as circumstances would admit? On that construction, if the wife happened to be dead at his decease, there was no need for a specification of a provision which could not be made; but the concluding words are a declaration, that if then alive, she and the issue should take jointly. My opinion, therefore, after repeated consideration, is, that the bond affects all the lands of which the obligor was seised during his life. (*a*)

June 2.

It was this day stated, by Sir *Samuel Romilly*, for the Plaintiffs, and Sir *Arthur Piggott*, for the Defendants, that the parties had agreed to refer to arbitration the subsequent questions in this case, subject to the decision of the Court, what equitable interest the children of the first marriage took under the settlement; whether they took, (according to the argument of the Plaintiffs) as tenants in common in fee, or (according to the argument of the Defendants) as tenants in common in tail with cross remainders, and with the ultimate remainder to the settlor in fee.

(*a*) On the effect of a marriage contract to convey or assure all the personal estate of which the husband should become possessed during the joint lives of himself and his wife, to the use of them and the survivor, see *Lewis* v. *Madocks*, 8 *Ves*. 150. 17 *Ves*. 48. 19 *Ves*. 66.

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The LORD CHANCELLOR.

I will state my present impression. The term "issue," must be understood to mean child or children, sons or daughters; and I think that the wife not having survived the husband, and, therefore, not having become capable of any provision, the conveyance must be made to the children as tenants in common in fee. The words "parts and proportions," appear to refer to the antecedent pecuniary provision; and the trust of the money affords a construction of the trust of the real estate. The money was to be taken by the children, in the actual event of the death of the wife, equally and absolutely; and I think, therefore, that their interests in the real estate are absolute and equal. The question, however, is not exempt from difficulty, and I will not now finally dispose of it.

June 9.

The LORD CHANCELLOR.

I remain of opinion, that the settlement could be made only in one of two ways, either on the children of the first marriage as tenants in tail, with cross remainders, with remainder to the father in fee, which, being of age, they may destroy by virtue of their vested remainders; or, (and I think that the true construction,) on the children of the first marriage in fee. Whichsoever of these constructions prevails, is equally fatal to the interests of the children of the second marriage.

The other questions were afterwards compromised.

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GENERAL ORDER IN BANKRUPTCY.

LORD CHANCELLOR.

21st *August*, 1818.

Whereas it hath been hitherto the practice on the petition of the bankrupt, with the consent of the creditors who have proved debts under the commission, to issue a supersedeas on a petition presented after the first and before the second meeting, and in some cases when the petitioning creditor alone may have proved his debt and signed such consent, without the concurrence in, or knowledge of, such proceeding by the greater number of the creditors: I do therefore order, that in future no commission shall be superseded on the ground of such consent of all the creditors who shall have proved their debts having been given, until after the second meeting. And I do further order, that on the commissioners being satisfied at the second meeting that a petition will be presented for superseding the commission, with the consent of all the creditors who shall have proved debts, that the commissioners do in such case adjourn the choice of assignees to some future day, in order to give the opportunity of presenting such petition for a supersedeas in the manner hitherto accustomed.

ELDON, Chancellor.

PRO-

1818.

PROMOTIONS.

In the vacation after *Trinity* term, 1818, Lord *Ellenborough* resigned the office of Chief Justice of the Court of King's Bench, in which he had presided from *April*, 1802.

Sir *Charles Abbott*, Knight, one of the Judges of the Court of King's Bench, was appointed Lord Chief Justice; and having been sworn into his office before the Lord High Chancellor on the 4th of *November*, took his seat on the first day of *Michaelmas* term.

Sir *Vicary Gibbs*, Knight, having resigned the office of Chief Justice of the Court of Common Pleas, was succeeded by

Sir *Robert Dallas*, Knight, one of the Judges of that Court; who having been sworn into his office before the Lord High Chancellor on the 5th of *November*, took his seat on the first day of *Michaelmas* term.

In the same vacation, the following gentlemen were called within the bar, as his Majesty's counsel.

Archibald Cullen, Esq. of the *Middle Temple*.
William Owen, Esq. of *Lincoln's Inn*.
William Wingfield, Esq. of *Lincoln's Inn*.
William Horne, Esq. of *Lincoln's Inn*.
George Heald, Esq. of *Gray's Inn*.

In the vacation after *Michaelmas* term, *William Draper Best*, one of his Majesty's Serjeants at law, and Chief Justice of *Chester*, was appointed one of the Judges of the Court of King's Bench.

John Richardson, Esq. of the *Middle Temple*, having been called to the degree of Serjeant at law, was appointed one of the Judges of the Court of Common Pleas. He gave rings with the motto, *More majorum*.

Mr. Ser-

Mr. Serjeant *Copley* was appointed Chief Justice of *Chester*.

In *Hilary* term, 1819, the following gentlemen took their seats within the bar.

As King's Serjeants,
Mr. Serjeant *Pell*.
Mr. Serjeant *Copley*.

As King's Counsel.
Giffin Wilson, Esq. of *Lincoln's Inn*.
Michael Nolan, Esq. of *Lincoln's Inn*.
Stephen Gaselee, Esq. of *Gray's Inn*, and
Robert Matthew Casberd, Esq. of the *Middle Temple*, by patent of precedence.

In the same term, were called to the degree of Serjeant at law,
Vitruvius Lawes, Esq. of the *Inner Temple*.
John Cross, Esq. of *Lincoln's Inn*, and
John Doyley, Esq. of the *Middle Temple*.
They gave rings with the motto, *Pro Rege et Lege*.

END OF THE SECOND PART.

REPORTS

OF

CASES

ARGUED & DETERMINED

1818.

IN THE

HIGH COURT OF CHANCERY,

Commencing in the Sittings before

HILARY TERM,

58 Geo. III. 1818.

Ex parte SMYTH, In the Matter of SMYTH, a Lunatic.

March 19.

Under a parol demise from year to year, by a tenant for life, with power to lease by deed, &c., the interest of the lessee determines with the life of the lessor, and the rent is apportionable. (*a*)

BY lease and release of the 8th and 9th of *May* 1781, certain estates were conveyed to the use of *Ann Smyth*, the wife of Sir *William Smyth*, for her life, mainder to trustees to preserve contingent remainders, remainder to trustees for a term of two thousand years, and, subject to the term, to the use of the first and other sons of *Ann Smyth*, in tail male, with ulterior remainders; and a power to her, by deed, &c. to let for any term, not exceeding twenty-one years, in possession, &c.

By

(*a*) The rule of the common law, that on the death of a lessor, tenant for life, in the interval between two periods, at each of which a portion of rent becomes due from the lessee, no rent can be recovered for the occupation since the

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By the will of *M. W. Bowyer*, other lands were limited to the same uses. *William Wyndham*, by his will, dated

the first of those periods, rests on two propositions; 1. that an entire contract cannot be apportioned (*a*); 2. that under a lease, with a periodical reservation of rent, the contract for the payment of each portion is distinct and entire.

In its familiar practical applications, the principle that an entire contract cannot be apportioned, seems founded on reasoning of this nature; that the subject of the contract being a complex event constituted by the performance of various acts, the imperfect completion of the event, by the performance of some only of those acts (as service during a portion of the specified period, navigation to an extent less than the voyage undertaken,) cannot, by virtue of that contract of which it is not the subject, afford a title to the whole, or to any part, of the stipulated benefit.

Whatever be the origin or the policy of the principle, it has, unquestionably, been established as a general rule, from the earliest period of our judicial history. The following are some of the authorities, by which it is enforced or qualified: *Bro. Abr. Apporcion. pl.* 7. 13. 22. 26. *Id. Contract, pl.* 8. 16. 30, 31. 35. *Id. Laborers, pl.* 48. 10 *H.* 6. 23. 3 *Vin. Abr.* 8, 9. *Finch Law, lib.* 2. *c.* 18. *Countess of Plymouth* v. *Throgmorton*, 1 *Salk.* 65. *Tyrie* v. *Fletcher*, *Cowp.* 666. *Robinson* v. *Bland*, 2 *Burr.* 1077, 1 *Bl.* 234. *Loraine* v. *Thomlinson*, *Doug.* 585. *Bermon* v. *Woodbridge*, *Doug.* 781. *Rothwell* v. *Cooke*, 1 *B. & P.* 172. *Meyer* v. *Gregson*, *Marsh.* on Insurance, 658. *Chater* v. *Becket*, 7 *T. R.* 201. *Cook* v. *Jennings*, 7 *T. R.* 381. *Cutler* v. *Powell*, 6 *T. R.* 320. *Wiggins* v. *Ingleton*, *Lord Raym*, 1211. *Cook* v. *Tombs*, 2 *Anstr.* 420. *Lea* v. *Barber*, 2 *Anstr.* 425, *n.* *Mulloy* v. *Backer*, 5 *East*, 316. *Liddard* v. *Lopes*, 10 *East*, 526. *How* v. *Synge*, 15 *East*, 440. *Fuller* v. *Abbott*,

(*a*) "Apportion," says Lord *Coke*, "signifieth a division or partition of a rent, common, &c. or a making of it into parts." *Co. Litt.* 147. The definition seems incomplete. Apportionment frequently denotes not division, but distribution; and, in its ordinary technical sense, the distribution of one subject *in proportion to another previously distributed.*

4 *Taunt.*

dated 21 *October*, 1784, devised certain estates to *Ann Smyth* for life, with remainder to *William Smyth*, her first son

4 *Taunt.* 105. *Stevenson* v. *Snow*, 3 *Burr.* 1237. *Long* v. *Allen*, *Marsh.* on Insurance, 660. *Park* on Insurance, 529. *Ritchie* v. *Atkinson*, 10 *East*, 295. *Waddington* v. *Oliver*, 2 *N. R.* 61.; and see *Abbott's* Law of Merchant Ships, p. 292, *et seq.*

From this principle it followed, that on the determination of a lease, by the death of the lessor, before the day appointed for payment of the rent, the event, on the completion of which that payment was stipulated (namely, occupation of the lands during the period specified,) never occurring, no rent became payable; and, in respect of time, apportionment was in no case permitted, (*Clun's* case, 10 *Co.* 127). But in the instance of real contracts, the general principle received a partial qualification, on the division of the subject matter, to which the contract referred; (*West* v. *Lassels*, *Cro. El.* 851. *Stephenson* v. *Lambard*, 2 *East*, 575.) and apportionment of rent was, therefore, under certain circumstances, allowed, by the common law, (2 *Inst.* 504.) on severance of the land from which it issued, or of the reversion to which it was incident, (*Clun's* case, 10 *Co.* 127. *Co. Litt.* 150, a. 292, b. *Huntley's* case, *Dyer*, 326, a. *Moor*, 114. *pl.* 255; and see *Doe* v. *Meyler*, 2 *M.* & *S.* 276.) An attempt to state the distinctions on this subject. would be foreign to the present purpose; it may be sufficient to remark, that while courts of equity seem to have assumed jurisdiction to extend the common law doctrine of apportionment of rent, in respect of eviction of the land, to cases which, though not within the definition of legal eviction, involved a substantial diminution of the benefit for the enjoyment of which the lessee contracted, (3 *Rep. in Cha.* 7. 1 *Ca. in Cha.* 31. 2 *Freem.* 174; but see *Duckenfield* v. *Whichcott.* 2 *Ca. in Cha.* 204.); or to substitute apportionment, where good faith required it, for extinguishment, (*Slater* v. *Buck*, *Mos.* 256. *Doctor and Student*, *Dial.* 2. *c.* xvi. ——— v. *Hawkes*, 1 *Ca. in Cha.* 273. *Elliot* v. *Hancock*, 2 *Vern.* 143; but see *Vincent* v. *Beverley*, *Noy.* 82,) they never qualified, but distinctly recognised, the rule

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son (since deceased) for life, with remainder to the use of his first and other sons, in tail male; with like remainder

rule, that rent can not be apportioned in respect of time, (*Jenner* v. *Morgan*, 1 *P. W.* 392. *Hay* v. *Palmer*, 2 *P. W.* 502; and see *Bentham* v. *Alston*, 2 *Vern.* 204.)

On the determination of a lease, therefore, by the death of the lessor, tenant for life, in the interval between two days of payment, no rent was paid by the lessee for the occupation of the estate, during the fractional portion of the year. To prevent this loss, the statute 11 *Geo.* 2. *c.* 19. *s.* 15. provides, that where any tenant for life (the expression in the preamble of the section is, any lessor having only an estate for life in the lands demised,) shall happen to die before or on the day on which any rent was reserved, or made payable, upon any demise, &c. which determined on the death of such tenant for life, his executors may recover from the under-tenant, if such tenant for life, die on the day on which the same was made payable, the whole, or, if before such day, then a proportion of such rent, according to the time such tenant for life lived, of the last year, or quarter of a year, or other time, in which the rent was growing due, making all just allowances.

Almost the only decision on the construction of this statute is *Whitfield* v. *Pindar* (a), 1781, in which the Court of Common Pleas declared the representatives of a tenant in tail, who had demised the entailed estate by a lease void against the remainder man, entitled to apportionment; deciding, therefore, that a tenant in tail is, within the description of the statute, a lessor having only an estate for life.

In *Wykham* v. *Wykham*, Sir *James Mansfield* inquired whether "it had ever been determined that the executor of a tenant *pur autre vie* is entitled to recover a portion of the rent from the last quarter-day under the statute?" observing, that "he is certainly within the mischief; for otherwise, the tenant of the land may keep the rent for his own benefit." 3 *Taunt.* 331.

Clarkson v. *Scarborough*, post p. 354, and the present case, establishing the general doctrine, that under a demise from

(a) Cit. 2 *Bro. C. C.* 662. 8 *Ves.* 311.

year

mainder to *Thomas Smyth*, her second son, and with a like leasing power.

Ann

year to year by tenant for life, with power to lease, not executed conformably to his power, the lessee, in the absence of special circumstances, is not entitled to the aid of equity for sustaining his interest against the remainder-man, and the tenure therefore determining with the life of the lessor; by the terms of the statute, the rent becomes apportionable.

In *Paget* v. *Gee*, *Amb.* 198. *Burn's* Just. tit. *Distress.* Reg. Lib. B. 1753, fol. 68, Lord *Hardwicke* intimated an opinion, that, in the instances of tenant in tail, after possibility of issue extinct, and tenant for a term of years determinable on his life, though not within the words of the act, whatever might be the decision of courts of law, a court of equity would direct apportionment. "As to the equity arising from the statute," his Lordship proceeds, "I know no better rule than this, *equitas sequitur legem*. Where equity finds a rule of law agreeable to conscience, it pursues the sense of it to analogous cases. If it does so as to maxims of the common law, why not as to reasons of acts of parliament?" It must be confessed, that this reasoning is little distinguished by the sagacity and discrimination which seldom deserted the eminent person to whom it is ascribed, and that the severe animadversion of a judicious writer (*a*) seems not wholly unmerited. The application of the maxim cited, to the rules of law, is founded indeed in each particular instance, not on the origin, but on the existence, of the rule. A period of limitation, or a principle of distribution, being established at law, becomes, for that reason, wherever it is not inconsistent with their peculiar doctrines, a guide to courts of equity, whether introduced by express enactment, by immemorial tradition, or by the exercise of the power of interpretation inherent in every judicial tribunal. (*b*) The statutes

(*a*) *Evans*'s Collection of Statutes, Part iv. cl. xix. p. 738, n.

(*b*) The maxim, that equity follows the law, is founded on the consideration that courts of equity are authorised, by the theory of their jurisdiction, to qualify the rules of law, so far only, as their peculiar principles require. See 2 *P. W.* 753, 754. *Ca. Temp. Talb.* 237. 1 *Schoales & Lefr.* 431. and the reasoning of Lor *owper* in the Earl

Ann Smyth, died in possession of the estates, on the 20th of *December* 1815, leaving *Thomas Smyth*, the lunatic,

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statutes of distribution and of limitation have afforded familiar instances of equitable decisions by analogy (some of them, more accurately perhaps, decisions in obedience) to acts of the legislature. But the distinction is palpable between statutes designed to introduce a general principle (whether with or without an enumeration of individual examples,) and statutes which provide only for particular cases. In the former instance, a new rule of law is established, the analogy of which may be consistently adopted, as its authority must be admitted, by courts of equity; in the latter, the ancient rule of law remaining, subject to the specific exceptions, the exercise of a power to extend in equity the provisions of the act to cases confessedly not within its legal operation, seems a function rather legislative than judicial. It is at least a function which the maxim alleged, so far from justifying, condemns. By the supposition, equity would not follow, but contradict the law, and exhibit a signal instance of the violation of the very principle which it professed to administer. The doctrine imputed to Lord *Hardwicke* has not been sanctioned by adjudication. The decisions commonly described as founded in analogy to the statute, proceeded on circumstances constituting a distinct equity. In explanation of those decisions it may be convenient to premise a summary

Earl of *Bath* v. *Sherwin*, 10 *Mod.* 1 *Gilb. Rep. in Eq.* 2 *Pre. in Cha.* 261, although his decision was reversed on appeal, 4 *Bro. P. C. ed. Toml.* 373. Lord *Redesdale*, in the course of a very able judgment, has remarked, "that it is a mistake of language to say that courts of equity act merely by analogy to the statute" (of limitation,) "they act in obedience to it." 2 *Schoales & Lefr.* 630. and see 1 *Ball & Beat*, 166, 167. The criticism seems merited by the logical inaccuracy of the expression, if employed to denote the *principle* of decision, in one class of the cases in question; but to act by analogy, is *effectually* to act in obedience. "Equity," his Lordship adds, "which in all cases follows the law, acts on legal titles, and legal demands, according to matters of conscience which arise, and which do not admit of the ordinary legal remedies; nevertheless, in thus administering justice, according to the means afforded by a court of equity, it follows the law."

of

lunatic, her eldest surviving son and heir. At her death, some of the estates were let under parol agreements

of the doctrine on the time at which rent becomes due, and the effect of the death of the lessor at different periods of the rent-day.

Rent, (although the proper time of demand, in order to take advantage of a condition of re-entry for non-payment, or of tender, in order to save a forfeiture, is sunset of the day of payment, *Hale* C. B. 1 *Saund.* 287. *Plowd.* 172.; or, more accurately, perhaps, such period before sunset as leaves interval sufficient for the payment. *Fabian* v. *Rewinston* (*al. Winston*), 1 *And.* 252. 2 *Lutw.* 1139. *Cro. El.* 209. *Clun*'s case, 10 *Co.* 127. *Thomson* v. *Field. Cro. Jac.* 499. *Co. Litt.* 202, a., the demand, in the former case, being continued till the instant of sunset, *Wood* v. *Chivers*, 4 *Leon.* 179.) is not due until midnight, (see *Cutting* v. *Derby*, 2 *Bl.* 1077. *Lefily* v. *Mills*, 4 *T. R.* 173.), and if a lessor tenant in fee dies on the rent-day between sunset and midnight, his heir (not his executor) is entitled to the rent. (*Hale* C. B. 1 *Saund.* 287. and see *Clun*'s case, *ubi supra.*) Payment before the appointed day (although sufficient, if made for that purpose, to confer seisin of the rent, *Clun*'s case *ubi supra*, 4 *Co.* 10, a., *Co. Litt.* 315, a.) is not satisfactory at law, (*Clun*'s case, *Co. Litt.* 315, a. 4 *Co.* 10, a. *Lord Cromwell* v. *Andrews*, *Cro. El.* 15.) *secus* it seems in equity ; (*Lord Rockingham* v. *Penrice*, from the register, *post*, p. 346.) but payment on the morning of the rent-day, the lessor dying before noon, is valid against the heir, (*Clun*'s case) not against the king. (*Ibid.*)

In deciding on conflicting claims to rent, with reference to these distinctions, courts, both of law and of equity, established a farther distinction between cases in which (before the statute of *Geo.* 2.) the rent would have been lost unless paid to the personal representative of the tenant for life, and those in which, being in all events payable by the lessee, the question arose, whether it should be paid to the heir or remainder-man, on the one hand, or to the personal representative of the tenant for life, on the other. Thus the grantee of a rent-charge for life payable at *Michaelmas* and

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ments to tenants from year to year, on rents payable half yearly, at *Michaelmas* and *Lady-day*, which were

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Lady-day, having died on *Michaelmas-day* between sunset and midnight, her administrator was declared at law entitled to the rent, on the ground that she had survived the time (namely sunset) when it was demandable and to be paid by the lessee, on pain of forfeiting his lease. *Southern* v. *Bellasis*, 1 *P. W.* 179, n.

In a subsequent case, a tenant for life with leasing power having granted leases, some by virtue of his interest, others by virtue of his power, reserving rent payable at *Michaelmas* and *Lady-day*, and having died on *Michaelmas-day*, about noon, Lord *Macclesfield* C. declared his representatives entitled to the rent accruing under the former leases, on the distinction, that it had actually become due to the tenant for life, and his right to it was vested in him, by the continuance of the term, through some part, though not to the last instant, of the day of payment; but the rent accruing under the latter leases, was declared to belong to the person entitled in remainder; for the terms continuing notwithstanding the death of the lessor, the tenant had, till the last instant of the days of payment ("the rent being payable on those days during the term"), to pay the rent, and it was, therefore, never completely due to the lessor, but followed the reversion. *Earl of Strafford* v. *Lady Wentworth*, *Prec. in Cha.* 555. The case is briefly reported to the same effect, 1 *P. W.* 180., the Court distinguishing between a rent incident to a reversion that must go somewhere, (if not to the executor, to the heir,) and a rent which would go nowhere, unless to the executor; and holding that in the latter case, if the lessor lived to the beginning of the day, at which time a voluntary payment might be made, this would be sufficient to entitle the executor or administrator, rather than the rent should be lost. But in another report of the same case, 9 *Mod.* 21. it is stated, that the tenants had paid the rent to the person entitled in remainder, and the judgment proceeds thus, " The single question is, whether this rent was due to the intestate, or not? for if it was, then the Plaintiff, who is his administrator, ought to have it. It is true

were afterwards paid to the receiver of the lunatic's estates.

On

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true that it was not due from the tenants, until the last minute of the day on which it is payable, neither could they be compelled to pay it, until after that day; but they having paid the rent, they admitted it was due from them, and it is plain the Defendant had no right to receive it; therefore, it being paid into a wrong hand, who received it without any title, it ought to be paid over to the Plaintiff, who had a colourable title to receive it, as administrator of the intestate." If the decree in favor of the personal representative was founded on the fact of payment by the tenant, to the person entitled in remainder, and on the reasoning contained in the last report, it is a precedent for decisions subsequent to the statute of *Geo.* 2., proceeding on a similar fact, which have been commonly, but it is believed erroneously, referred to a supposed equitable analogy to the provisions of the statute. The decree, as it appears in the Register, declared, that Sir *Henry Johnson*, the tenant for life, dying on *Michaelmas-day*, about two o'clock in the afternoon, the Defendant Lady *Wentworth*, (tenant for life in remainder,) was entitled to the rents of such of the estates of which leases were made by Sir *H. J.*, pursuant to his power, and subsisting at his death, (and also of estates in the occupation of two tenants, one under a lease for life, the other under an agreement for a term of years, but the reasons for establishing their interest after the determination of Sir *H. J.*'s estate, are not mentioned,) that as to the rents of the rest of the estates, whereof leases were not made pursuant to his power, or whereof such leases were expired, due at *Michaelmas-day*, the Plaintiff, as administrator of Sir *H. J.*, was entitled to them; and directed an account against Lady *Wentworth* of such rent due at *Michaelmas-day, and afterwards received by her, or any person for her use.* Reg. Lib. A. 1720. fol. 346. The receipt of the rent by the person entitled in remainder, is therefore ascertained; the influence of that fact on the decree, seems by no means clear.

In *Lord Rockingham* v. *Penrice*, 1 *P. W.* 177. *Salk.* 578. a tenant for life, with leasing power, dying on *Michaelmas-day*, before sun-set, the rent due on that day, from tenants under leases conformable to the power, was declared payable, not to

the

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On a reference to inquire whether any, and what part of the estates which, on the death of *Ann Smyth*, devolved

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the executor of the lessor, but to the jointress taking a life estate in remainder, on the ground that the lessor dying, before sunset, had no remedy before his death to compel payment, and the rent, therefore, passed to the jointress with the reversion. The report in *Peere Williams*, states, that one of the lessees having paid his rent to the tenant for life on the morning of *Michaelmas-day*, the Court declared the payment good as to the lessee, but directed the executor of the tenant for life to account for it to the jointress; and the reporter subjoins a question, why, if the payment was good at law, (as it was according to *Clun*'s case) it must not be so in equity? On reference to the Register-book, it appears, that the payment was made, not on the morning of *Michaelmas-day*, but on the 21st of *September*, the lessee (on occasion of surrendering the old and taking a new lease) then paying the rent which would have become due on the 29th. The decree declared that, " Sir *J. Oxenden*, (the tenant for life) dying on *Michaelmas-day* before sun-set, and before the tenants of the jointure estate were by law obliged to pay the half-year's rent, the said rent belonged to Lady *Oxenden*, the jointress, and not to the executor of Sir *J. O.*, and directed an inquiry what had been received by Sir *J. O.*, or his representative, for the half year's rent due at *Michaelmas* 1708, and what was still due from the respective tenants of the jointure estate, and as to the tenant who had paid the rent before it became due, declared that Sir *J. O.* living till *Michaelmas-day*, it was a good payment as to the tenant, but that the executor of Sir *J.O.* must make the same good to the jointress. *Reg. Lib.* A. 1711., *fol.* 341.

In a very recent case, a tenant for life having granted leases in conformity to his power, and dying before midnight though after sun-set, on the rent day, the remainder-man was declared entitled to the rent. (*Norris* v. *Harrison*, 2 *Madd.* 268.)

The decision in *Paget* v. *Gee*, the first of the class currently cited as decisions by an equitable analogy to the statute, is explicitly founded, by the distinguished Judge* who pronounced it, on the fact of payment.

In

devolved to the lunatic, were at her death let from year to year, or at will; and whether Sir *William Smyth*,

In that case a tenant in tail having executed leases, not conformable to the statute of *Hen.* 8., and dying without issue, between the rent days, and the whole of the rent accruing at the rent day ensuing his death having been paid to the remainder-man, by the lessee, on a bill filed by the executors of the tenant in tail, Lord *Hardwicke* decreed an apportionment. Declining (though with a strong intimation of opinion) to decide the question whether the case was within either the legal or the equitable construction of the statute, he expressly states, as the foundation of his decree, the fact of "the tenant having paid the rent; the payment had been for the use and occupation, during all the half-year; and it would be against conscience, for the remainder-man to retain the whole." And his Lordship, added, "a case to that purpose was before Lord *Macclesfield*," (a) referring probably to *Lord Strafford* v. *Lady Wentworth*, *ante*, as reported in 9 *Mod.*

In *Vernon* v. *Vernon*, 2 *Bro. C. C.* 659., lessees under demises from year to year, by the testamentary guardian of an infant tenant in tail, who died between two rent days, having paid the rent to the receiver, Lord *Thurlow* decided that the representatives of the infant, were entitled to apportionment. This decision, so far as it can be collected from the short, and not very clear, report of the judgment, proceeded on the fact, that the tenants holding under a guardian, without lease or covenant, were considered in equity, rather as tenants at will, than from year to year, (see 8 *Ves.* 312.); a more intelligible ground, seems the actual payment. It is impossible, indeed, to avoid entertaining very considerable doubt of the accuracy of the report, which represents Lord *Thurlow* to have characterised the case of *Paget* v. *Gee*, as rather a decision what the statute ought to have done, than what it has done. It seems extraordinary, that when Lord *Hardwicke* had expressly rested his decree on the fact of payment, Lord *Thurlow* should persist in describing it as a decision on the effect of the

(a) *Amb.* 200, 201.

statute;

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Smyth, her administrator, was entitled to any, and what part of the rents: the Master reported, that Sir *William*

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statute; and should in that view dissent from it, without noticing the case of *Whitfield* v. *Pindar*, cited in the argument, in which the statute had actually received that construction from a court of law. It is understood, however, that the decision of Lord *Hardwicke* was originally doubted, but eventually approved, by Lord *Thurlow; see post*, p. 356.

In *Hawkins* v. *Kelly*, 8 *Ves*. 308., a lease for years of tithes by a rector, under a rent payable annually, ceasing on his death, and the succeeding incumbent having received from the lessee a sum of money as the rent due for the whole year, in the course of which the lessor died, apportionment was decreed in favor of his executor. The nature of the equity of the personal representative of the lessor, arising from the receipt of the whole rent, by an individual entitled to a part only, is there fully considered; and the decision in *Paget* v. *Gee* is unequivocally referred to that principle. (*a*) A like account of that decision is given in *Aynsley* v. *Wordsworth*, 2 *Ves*. & *Beam*. 331., where the amount of compositions (payable annually) for tithes by a rector, having been received after his decease by his successor, apportionment was directed in favor of his executrix. (*b*)

The foundation of these decisions is, that the money being paid in respect of the enjoyment of the subject, is understood as paid to the use of the person from whom that enjoyment is derived (*c*); and the principle of apportionment is therefore TIME, *Aynsley* v. *Wordsworth*, 2 *Ves*. & *Beam*. 331; the total payment being distributed in proportion to the respective periods of enjoyment. That principle of apportion-

(*a*) See also 10 *East*, 272.

(*b*) The Court of Exchequer is represented to have decreed apportionment of rent on a lease of tithes, in one instance by the incumbent, (*Meeley* v. *Webber*, 2 *Eq. Ca. Ab*. 704, n. a. *Amb*. 201.); in another instance, on a lease *pur auter vie*, at the death of one of the *cestuis que vie* (*Talbot* v. *Salmon*, 2 *Eq. Ca. Ab*. 704, n. a. *Amb*. 201.) but whether these decrees were prior or subsequent to the statute, and on what principle they proceed, is not stated.

(*c*) Some ingenious strictures on this reasoning may be found in the valuable dissertation already cited; *Evans*'s Collection of Statutes, part iv. cl. xix. p. 739, n.

ment,

liam Smyth was entitled, as her administrator, to such proportion of the rents of the estates let from year to year,

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ment, consequent on the nature of the equity, is supported by the analogy of the statute; and the decision in *Williams* v. *Powell*, 10 *East*, 269. if intended to establish a different principle, may be considered as overruled; or, at least, as not adopted in equity.

Courts of equity will not apportion land-tax and quit-rents, between the representatives of the tenant for life and the tenant in remainder; the statute of *Geo.* 2. not being applicable to that case. *Sutton* v. *Chaplin*, 10 *Ves.* 66. A strong authority against the assumption of analogical jurisdiction.

The rule of law, which refuses apportionment of rent in respect of time, is applicable to all periodical payments becoming due at fixed intervals; not to sums accruing *de die in diem*. Annuities, therefore, (3 *Atk.* 261. 2 *Bl.* 1016.), and dividends on money in the funds, are not apportionable. (*Rashleigh* v. *Master*, 3 *Bro. C. C.* 101. *Wilson* v. *Harman*, 2 *Ves.* 672. *Amb.* 279. *Pearly* v. *Smith*, 3 *Atk.* 260. *Sherrard* v. *Sherrard*, 3 *Atk.* 502.) But interest, whether the principal is secured by mortgage (*Wilson* v. *Harman*, *Sherrard* v. *Sherrard*) or by bond, notwithstanding that it is expressly made payable half yearly (*Banner* v. *Lowe*, 13 *Ves.* 135.) may be apportioned; for though reserved at fixed periods, it becomes due *de die in diem* for forbearance of the principal, which the creditor is entitled to recall at pleasure. Thus a sum of money, which it was covenanted in marriage-articles should be invested in lands, having been lent on mortgage, at the death of the person entitled to an estate tail in the land, the interest was apportioned in favor of his administratrix. (*Edwards* v. *Countess of Warwick*, 2 *P. W.* 176. 1 *Bro. P. C. ed. Toml.* 207.)

In strictness these are not cases of apportionment; (2 *P. W. ed Cox*, 503., n. 1.;) they are not instances of the distribution of one entire subject among individuals entitled each to a part, but the appropriation of distinct subjects to the respective owners.

A remarkable exception to the general rule has been introduced in the instance of annuities for the maintenance of infants (*Hay* v. *Palmer*, 2 *P. W.* 501. *Rhenish* v. *Martin*, 1746,

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year, for the half-year ending at *Lady-day*, 1816, as accrued from *Michaelmas*, 1815, to the 20th *December* following, being the day of her death.

Two petitions were presented, one by Sir *William Smyth*, praying the confirmation of the report; the other by *Edward Smyth*, committee of the lunatic, praying, that the lunatic might be declared entitled to the whole of the rents of the estates let from year to year, for the half-year ending at *Lady-day*, 1816.

1746, MS.), or of married women living separate from their husbands (*Howel* v. *Hanforth*, 2 *Bl.* 1016., 2 *Schoales & Lefr.* 303.); an exception supported by the necessity of the case, and the consequent presumption of intention (2 *Bl.* 1017., 2 *P. W.* 503.), and therefore not extending to an annuity for the separate use of a married woman, living with her husband and maintained by him. (*Anderson* v. *Dwyer*, 1 *Schoales & Lefr.* 301.) (*a*)

An annuity payable quarterly, secured by the bond of a testator whose will charged his real, in aid of his personal, estate, being, under an order of the Court of Chancery, directed to be paid half yearly at *Midsummer* and *Christmas*, and the annuitant having died between *Lady-day* and *Midsummer*, her representative was declared entitled to the arrears due at *Lady-day*. *Webb* v. *Lady Shaftesbury*, 11 *Ves.* 361.

(*a*) In a much earlier case, not cited in the course of these discussions, the Court of Common Pleas held, that a contract, by a father, to pay an annual sum for the "tabling" of his son, was apportionable; "because, it being for tabling, there ought to be a recompence, although he departed within the year, or that the contractor died within the year," (*Bret.* v. *I. S. Cro. El.* 756; and see *Parslow* v. *Dearlove*, 4 *East*, 438.) and it seems, that the rigorous application of the general rule to contracts of service, (*Bro. Abr. Apporcion, pl.* 13. 22. 26. *Contract, pl.* 30, 31. *Laborers. pl.* 48. 3 *Vin. Ab.* 8, 9. *Countess of Plymouth* v. *Throgmorton*, 1 *Salk*, 65.) is now relaxed at law. "A servant, though hired in a general way, is considered to be hired with reference to the general understanding upon the subject, that the servant shall be entitled to his wages for the time he serves, though he does not continue in the service during the whole year." *Lawrence* J. 6 *T. R.* 326.

Mr.

Mr. *Wetherell*, for the latter petition.

Since the modern doctrine of courts of law has substituted tenancy from year to year, for tenancy at at will, the lessee of a tenant for life with a power to let, under a lease not conformable to the power, is entitled after the death of the tenant for life to retain possession till the expiration of the year: the right of the lessee surviving, although the interest of the lessor is determined; as in the instance of emblements. The rent being entire, follows the reversion, and belongs to the remainder-man. The statute (*a*), has supplied the principle that apportionment shall be made, where the rent would otherwise be lost, (as if by the terms of the lease, the tenancy ends with the life of the lessor,) not where it would be saved. Lord *Kenyon*, while at the bar, gave a decided opinion, that in such cases, rent is not apportionable. (*b*)

(*a*) 11 *Geo.* 2. c. 19. s. 15.

(*b*) The following is a copy of that opinion, and of the case on which it was given :

C. L. a tenant for life, granted a lease pursuant to a power for that purpose, of part of the estates of which he was tenant for life, but other parts he had let by parol only, i. e. from year to year, reserving the rents to be paid on the 5th *April* and 10th *October*, and he died eight days before the half-year's rent became payable. The question is, whether the reversioner is entitled to the whole of the half-year's rent, which was payable on the 5th *April* 1780; or, whether, under the words of the statute 11th *Geo.* 2. *c.* 19. the executor of the tenant for life, is entitled to the proportion of the rents due at his death? —— Lord *Kenyon*'s opinion. — Supposing formal leases had been made conformable to the power, it would have been clear that the remainder-man would have been entitled; it is equally clear, that if the agreements under which these tenants held, were not binding on the remainder-man, the rent ought to be apportioned; but I think the agreements did bind in equity, for the inter-

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Sir *Sam. Romilly*, for the report.

Lord *Kenyon*'s opinion proceeds on the supposition, that the leases, though void at law, are good in equity, under

ests of the tenants, under the agreements, did not exceed the interest which the tenant for life had power to grant; and since the case of *Leach* v. *Campbell*, determined by Lord *Bathurst*, assisted by *de Grey* C. J. and *Smythe* C. B. it is understood, that tenants, being purchasers for a valuable consideration of the interest contracted for by them, have a right in equity to have forms dispensed with, supposing the interest they have contracted for, is within the limits of the power given to the party who contracts to confer it. Upon that ground, therefore, and as, if that be so, the rent would not have been in any part lost, but would have been recoverable by the remainder-man ; and, as the statute only apportions rent which would otherwise have been in part lost, I incline to think that the remainder man is entitled to all the rent from the rent-day next preceding the death of the tenant for life. I believe this point has not been judicially decided. It may probably come in judgment in a case depending in the Earl of *Bristol's* family, and some time ago I concurred with Mr. *Dunning* and Mr. *Maddocks* in an opinion to the effect of that I have now given, between the executrix of Sir *Thomas Aston* and the remainder-man. I ought to say that Mr. *Maddocks* was at first of a contrary opinion.

On a case involving the same question, the following opinion was given by Sir *Samuel Romilly*.

" The case cannot, I think, be distinguished from that on which Lord *Kenyon*'s opinion was given. It appears, therefore, that in the opinion of Lord *Kenyon* and of Lord *Ashburton*, and Mr. *Maddocks*, (for Lord *K.* states that they concurred with him in the opinion he gave,) the rent in this case is not to be apportioned, and the remainder-man is entitled to the whole of the half-year's rent, which became due at Lady-day last. I cannot venture to differ from such high authority, especially where I do not know of any direct decision that I can oppose to it. If, indeed, it be clear that a court

under the authority of *Leach* v. *Campbell* (a), which is supported by *Shannon* v. *Bradstreet*. (b) In those instances courts of equity gave validity to leases void at law,

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a court of equity would in this case have established the interests of the tenants, as tenants from year to year, against the remainder-man, I think it would follow of necessity, that the remainder-man would be entitled to the whole rent, because the case would then be not a case within the statute, and the remainder-man finding a tenant upon the estate, whom he could not turn out of possession, ought to have the benefit of receiving the rent from the last day of payment, before he became entitled in possession. I should, however, if it had not been for the authority of such opinions, have doubted whether the Court would have supplied the defects in the execution of the power in favour of the tenants against the remainder-man. I should have thought it by no means clear, that a tenant from year to year, who does not reckon upon having any permanent interest, and who is only to pay for the enjoyment of the estate while he is permitted to enjoy it, could be considered as a purchaser; and I should have thought the case of *Leach* v. *Campbell*, which is referred to by Lord *Kenyon*, and has been since reported, *Amb*. 740. was distinguishable from the present case, that being the case of a lessee who had laid out large sums of money upon the faith of his contract, by which he was to hold the estate for 21 years. The doctrine laid down in *Leach* v. *Campbell* has not been extended, but on the contrary has rather been narrowed by later decisions, particularly the case of *Medwin* v. *Sandham*, in the *Exchequer*, 2d *March* 1789. (a) However it must certainly be advisable

(a) *Amb*. 740. *Sugden* on Powers, App. p. 673.

(b) 1 *Schoales & Lefr*. 52.

(a) In that case, under a power to grant leases with usual covenants, a lease having been granted containing an unusual covenant, and for that reason declared void at law, (*Doe* v. *Sandham*, 1 *T. R*. 705.) a bill filed by the lessee against the remainder-man to expunge the unusual covenant, was dismissed. See *Sugden* on Powers, p. 365.

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law; but the decisions were founded on special circumstances, and not on any general doctrine, that if a tenant for life, with leasing power, grants a lease not conformable to his power, a court of equity, considering the lessee as a purchaser for valuable consideration, will, as matter of course, supply the defect. Upon the supposition, that the lease is valid at law after the death of the tenant for life, the statute was useless. The question occurred before the late Master of the Rolls in *Clarkson* v. *Lord Scarborough* (a), and His Honor, taking

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for the remainder-man, upon the authority of such opinions as have been given on this point, to insist upon his right to the whole of the half-year's rent of the testator's real estate, which became due at Lady-day last.

A tenant for life with leasing power, having granted leases from year to year, some by parol, some in writing, but not conformable to the power, on his death before the expiration of the year, the rents are apportionable.

(a) The late Earl of *Scarborough*, under a settlement dated the 20th *January* 1775, was tenant for life of certain estates, with remainder to his first and other sons in strict settlement, with remainder to the present Earl for life. The settlement contained a proviso, that it should be lawful for the Earl of *Scarborough*, when in actual possession of the premises, by indentures sealed and delivered in the presence of, and attested by, two or more credible witnesses, to lease any part of the premises, (except the capital mansion-house and certain lands therein described,) for any term of years not exceeding 21 in possession, so as upon every such lease there were reserved half-yearly, or quarterly, the most improved yearly rent; and so as such leases respectively were not made dispunishable of waste by any express words, and there were contained therein a clause of re-entry for nonpayment of the rent; and the several lessees should respectively execute counterparts thereof. The Earl of *Scarborough* let various parts of the lands comprised in the settlement, by articles of agreement, (under the hand and seal of his agent, some on deed stamps, and others without stamps, attested by one witness) by indentures, (under the hand and seal of his agent, and attested by one witness, some on deed stamps, some on agreement stamps, and others without stamps,) and by parol, to tenants from year to year,

taking time for consideration, decided that the rent is apportionable.

The LORD CHANCELLOR.

I always understood, that when the landlord was tenant for life only, whether the lease was to be considered as creating a tenancy at will, or, according to the inclination of the courts, a tenancy from year to year, the tenancy was, in either case, qualified by the restriction, that it continued so long only as the estate of the landlord authorised its continuance. Before the statute (*a*), therefore, if the tenant for life died while the half year was incomplete, the rent was lost, his representatives not being entitled to recover a part. Such I have conceived to be the law, except with regard to cases of a peculiar description, which have long been the subject of discussion in this Court. A tenant for life, pos-

year; and the articles of agreement and indentures respectively, did not make the lessees dispunishable of waste by express words, nor contained any clause of re-entry for non-payment of rent. On the 5th of *September* 1807, the late Earl of *Scarborough* dying without issue male, the estates descended to the present Earl, and rents accruing in respect of the demises, and becoming payable at certain times after the death of the former, were received by his successor. On the 30th *June* 1815, the cause of *Clarkson* v. Earl of *Scarborough* was heard before the late Master of the Rolls, for further directions, on the Master's report stating these facts, and stood for judgment till the 2d *April* 1816, when His Honor declared, that the rents of the estates of which the late Earl of *Scarborough* was tenant for life, with remainder to the present Earl, ought to be apportioned between the present, and the estate of the late, Earl. Reg. Lib. A. 1815. fol. 1009.

(*a*) 11 *Geo.* 2. *c.* 19.

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sessing a leasing power, which he might have exercised, (there being a seisin that would have fed the demise, and have interposed a tenancy between the lessee and the remainder-man,) much controversy has occurred upon the question, what shall be an equitable execution of such a power? The doctrine to be found in *Leach* v. *Campbell* always struck me as most extraordinary, that when a man does what is least like, or rather what is most opposite to the execution of the power, he shall be considered as executing it.

I learn with satisfaction, the decision of the Master of the Rolls. That the law was such as he has declared, may be shown, not only by the cases on demises of tithes, but by the doctrine of Lord *Thurlow* approving the decision of Lord *Hardwicke* in *Paget* v. *Gee*. There, on a lease executed by tenant in tail, not conformable to the statute, and determining, therefore, with his life, the lessees continuing in possession, having paid the whole rent to the remainder-man, Lord *Hardwicke* decreed apportionment; holding, that the remainder-man having received the whole rent accruing since the last day of payment, and accruing, therefore, partly in respect of occupation during the life of the tenant in tail, had received for his representatives, so much of the rent as was paid in respect of an enjoyment of the estate during the term of his life. On that decision, Lord *Thurlow* at first felt a difficulty, in admitting the application of the statute of *Geo.* 2 (*a*), but eventually approved it, and in giving judgment in the *Shrewsbury* case (*b*), took occasion to express his approbation.

(*a*) See *ante*, p. 347, n.

(*b*) That case is reported 3 *Bro. C. C.* 120. 1 *Ves. jun.* 227. but the *dictum* in question seems to have escaped the attention of the reporters.

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I entertain not the slightest doubt, that the lease of a tenant for life expires with his interest, unless it is a lease made under a power, the farther execution of which can be sanctioned in a court of equity, by the particular circumstances of the case. A man dealing for his own estate, cannot be understood as meaning to affect the interest of another. (*a*)

Confirm the Report. Reg. Lib. B. 1817., fol. 642.

(*a*) A comparison of the authorities on this subject, seems to establish the conclusion, that in the case of a written agreement for a lease, (*Shannon* v. *Bradstreet*, 1 *Schoales & Lefr.* 52.) or an actual lease not pursuant to the power, (*Campbell* v. *Leach*, *Amb.* 740, *Sugd.* on Powers, App. 673) but defective only in form, (7 *T. R.* 480.) courts of equity may, to the extent of the leasing power, enforce the contract of a tenant for life against the remainder-man, in favour of a lessee, upon whom the circumstances of the transaction have conferred the character of a purchaser; (*Sugden* on Powers, p. 363, et seq.) but that no such relief can be afforded in the instance of a parol agreement, though rendered valid against the tenant for life, by acts of part performance; (*Blore* v. *Sutton*, 3 *Mer.* 237., 1 *Schoales & Lefr.* 72.) the reason of exempting from the operation of the statute of frauds, parol agreements partially performed, (namely the fraud of impeaching, for the want of evidence in writing, a contract after acquiescence in the performance of onerous acts on the faith of its validity,) being applicable to the tenant for life only, not to the remainder-man who has neither agreed nor acquiesced. In order to constitute a title to relief, therefore, two circumstances must concur; the agreement must be in writing, and the lessee must sustain the character of purchaser. The cases in which agreements of the tenant for life have been established by acts of acceptance, or acquiescence of the remainder-man, rest on different principles.

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MORTIMER *v.* WEST.
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Infants being made co-plaintiffs in two suits relative to the same matter, the court will not, before a decree, on the master's report, that one suit is more for the benefit of the infants, dismiss the bill in the other suit, unless by consent.

THE Bills, in these cases, were filed by persons claiming under the will of *Richard Mortimer*, and in each, three infants, interested in his estate, were made Co-plaintiffs. The Master, to whom it had been referred to inquire, whether the bills were for the same matter, and which of them was most proper, and for the benefit of the infants, to be prosecuted, having reported, "that both the said bills, so far as they relate to the personal estate, were for the same matters, but that the bill in the first mentioned cause, contained the proper charges, and prayed the proper relief, respecting the real estates of the testator, which the bill in the second mentioned cause had omitted to do, for which reason he was of opinion, that the bill filed in the first mentioned cause, was the most proper, and for the benefit of the infants, to be prosecuted;" some of the Defendants now moved, that the bill filed in the second cause, might be dismissed with costs.

Mr. *Belt*, in support of the motion.

Mr. *Hart* opposed the motion as unprecedented.

It may be proper after the Master's report, to expunge the names of the infant Plaintiffs, but no decree having been pronounced, the Court has no authority to dismiss the bill. On payment of costs to the Plaintiffs in the second suit, proceedings may be staid.

The LORD CHANCELLOR.

If two bills are filed by creditors, the Court cannot, before a decree, stop either suit; because, *non constat*, that a decree will ever be obtained. In this instance, the second suit can be staid only by consent, and on the terms proposed by the parties.

By consent of the Plaintiffs and Defendants in both suits it was ordered, that proceedings in the second suit should be staid, on payment of costs, with liberty to them, in case the Plaintiffs in the first suit delay to bring their cause to a hearing, to apply for leave to proceed in the second cause, or to have the carriage of the first cause. Reg. Lib. B. 1817., fol. 506.

ROLLS.
April 9, 15, 21, 23.
June 2.

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Construction of instruments as imposing an obligation to elect, and of acts as constituting election. The acts of a party bound to elect between two inconsistent rights, in order to constitute election, must imply a knowledge of the rights, and an intention to elect; possession being, under the circumstances, equivocal, as referrible to either right, the execution of deeds containing recitals of the character in which the party claimed, and the exercise of a power to dispose of the estates in that character, amount to conclusive evidence of election.

SIR *Henry John Parker* Bart., being seised in fee of the manor of *Talton* in *Worcestershire*, and of a house in *Salisbury Court*, *Fleet-street*, and being possessed of a farm in the manor of *Tredington*, in *Worcestershire*, held under a lease for lives from the Bishop of *Worcester*, by indentures of lease and release dated the 1st and 2d of *October*, 1741, in consideration of marriage (afterwards solemnised) with *Catherine Page*, his second wife, and of 5000*l*. her portion, conveyed the estates before-mentioned, and all other lands or hereditaments in which he or any person in trust for him had any estate of inheritance or freehold, within the manor of *Talton* or *Tredington*, to *John Page* and *William Trawell*, their heirs and assigns, to the use of Sir *Henry John Parker*,

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until the marriage, and after the solemnisation thereof, to the use of Sir *Henry* for his life; with remainder, as to the estates of inheritance, to trustees to preserve contingent remainders, remainder to the first and other sons of Sir *Henry* by his intended wife, in tail male, remainder to the use of Sir *Henry* in fee; and after the decease of the survivor of Sir *Henry* and his wife, as to the leasehold estate in the manor of *Tredington*, to the use of such son of Sir *Henry* by his intended wife as should be his heir for the time being, during the continuance of that estate, and of such life or lives then or thereafter in being, for which the leasehold premises were or should be granted; and in case such son should not, at the decease of the survivor of Sir *Henry* and his wife, have attained, or should not afterwards attain, the age of 21 years, then to the use of such son and heir of the body of Sir *Henry* by his intended wife, as should first attain that age during the continuance of the said estate, and of such life or lives as aforesaid; and in default of such son and heir in being at the decease of the survivor of Sir *Henry* and his intended wife, or then in *ventre sa mere*, and afterwards born alive, or in case every such son of Sir *Henry* by his intended wife, as should be living at the death of Sir *Henry* and his wife, or the survivor of them, or born after the decease of Sir *Henry*, should happen to die before any such son should attain the age of twenty-one years, then to the use of Sir *Henry*, his heirs and assigns, during the life or lives in being for which the premises then were or thereafter might be held and enjoyed.

The issue of the marriage were a son, *John Parker*, and two daughters, *Catherine*, (afterwards married to *C. F. Garstin*) and *Margaret Sophia* (afterwards married to *John Strode*), who all survived the death of their mother in 1750.

John

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John Parker, on attaining the age of twenty-one, in the beginning of the year 1766, became, under a conveyance from Sir *Henry John Parker*, dated in *October* 1753, tenant in fee simple of one moiety of certain estates situate at *Hatch* in the county of *Wilts*, and, under the will of *John Page*, his maternal grandfather, tenant in tail of the other moiety of those estates; he also became seised (in fee simple) of a messuage in *Shorter*'s Court in the city of *London*, and of an estate tail in remainder in the estates comprised in the settlement of 1741, and entitled to considerable sums of money under the will of *John Page*, including a debt due to *Page*'s estate from Sir *Henry John Parker*; and he soon afterwards levied fines and suffered recoveries of the estates devised to him by *Page*, limiting them to such uses as he should by deed or will appoint, and for default of appointment to himself for life, with remainder to his father Sir *Henry John Parker* in fee. By his will dated the 2d of *August* 1769, *John Parker* devised all his freehold and leasehold estates whatsoever that he was seised or possessed of, or was or should be entitled unto, in reversion, remainder, or expectancy, to his father Sir *Henry John Parker* and his assigns for his life; and after his decease he gave his estates in *Shorter*'s Court, and the moiety of his estates at *Hatch*, and all other his real estates devised to him by the will of his late grandfather *John Page*, to *Harry*, afterwards Sir *Harry*, *Parker*, and *Daniel Fox*, in fee, upon certain trusts for the benefit of his sisters *Catherine* and *Margaret Sophia*, and their issue. He also devised, after the decease of his father, the manor and capital messuage called *Talton*, with the estate thereto belonging, the farms called *Tredington*, and *Nolland*'s farm, in the parish of *Tredington*, and all other his manors and estates in *Worcestershire* and *Warwickshire*, his house in *Salisbury* Court, the other moiety of his estates at *Hatch*, and all other estates whatsoever which de-

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scended or came, or which should descend or come, to him from his father, to his two sisters *Margaret* and *Ann Parker* (daughters of Sir *Henry John Parker* by his first wife) their heirs, executors, &c. for ever, as tenants in common. All the residue of his personal estate he gave to his father, and appointed him, if he survived, sole executor.

After the date of his will, *John Parker* purchased a freehold estate at *Arnscott*, in the parish of *Tredington*, and by a codicil dated the 2d of *September* 1769, noticing his will, he devised that estate to his father Sir *Henry* in fee; and reciting that his father formerly executed a bond in the penal sum of 2000*l.* conditioned for the payment of 1000*l.* with interest to his late grandfather *John Page*, whereof the testator was entitled to one-third, and his sisters *Catherine* and *Margaret Sophia* to two-thirds, he declared that no part of the principal or interest due on the said bond, or on any other bond or security, should be paid by his father, but that the same and all other bonds and securities should be delivered up to him to be cancelled; and he enjoined his sisters to forbear any suit or prosecution of his father, on account of the said bond, or in any other respect, under pain of forfeiting all bequests in their favour.

John Parker died in *September* 1769, unmarried and without issue, his father, and *Margaret* and *Ann Parker*, his sisters of the half blood, and *Catherine Garstin* and *Margaret Sophia Strode*, his sisters of the whole blood and co-heiresses at law, surviving.

Sir *Henry John Parker*, on the death of his son, proved his will, and possessed himself of his personal estate, and entered upon and enjoyed during his life the estates devised to him; and in *May* 1770 mortgaged the *Arnscott* estate for 900*l.*

By

By his will dated the 10th of *November* 1769, Sir *Henry John Parker*, after directing his debts to be paid, devised to *Henry Parker* and *Daniel Fox*, in fee, his manor of *Talton*, and his capital messuage or tenement, wherein he then dwelt, called *Talton* house, and all the farms and tenements thereunto belonging; and all other, his freehold manors, lands, and hereditaments in *Worcestershire*, and *Warwickshire*; his freehold house in *Salisbury Court*; one undivided moiety of the manor lands and hereditaments situate at *Hatch*, or elsewhere in the county of *Wilts*, which descended to him as heir at law of the family of the *Hydes*; and all other his freehold estates, whatsoever and wheresoever, that he had power to dispose of; to the use of *Parker* and *Fox*, their executors, &c., for the term of one thousand years from his decease, upon the trusts thereinafter declared; with remainder, as to one undivided moiety of all the premises, to the use of his daughter *Margaret Parker*, for life, with limitations to her first and other sons successively in tail male, and as to the other moiety to the use of his daughter *Ann Parker*, with like limitations to her first and other sons, with various ulterior remainders, including a limitation to Sir *William Parker* for life, and to his first and other sons in tail male; declaring it to be the meaning of his will, that the above mentioned estates should, after the decease of his daughters *Margaret* and *Ann* without issue male, constantly descend to the right heir male of the *Parker* family, in the manner he had above limited the same, as such heir male would inherit his title; it being his intent that such his estates and title should descend and be enjoyed together as long as the laws of *England* would permit. He then devised to *Henry Parker* and *Daniel Fox*, all his leasehold estates in the parish of *Tredington* in the county of *Worcester*, and in the parish of *Hampton* in *Arden* in the county of *Warwick*, and all

other

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other his leasehold estates, for all the estates, terms of years, and interests that he should have therein respectively at the time of his decease, subject to the rents and covenants in the several original lease or leases reserved and contained, upon trust to permit the same persons one after another respectively, to enjoy his leasehold premises, and to receive the rents and profits thereof, in the same manner as such persons would by his will be entitled to his freehold estates; it being his intent that his leasehold, should be enjoyed with his freehold, estates, and remain to the same persons and to the same uses, as long as the laws of *England* would permit.

The testator declared, that the term of one thousand years was limited to *Parker* and *Fox*, on trust from time to time, by sale or mortgage of the freehold and leasehold manors, messuages, &c., or with the rents and profits, or otherwise as they should think fit, to raise such sums of money as should from time to time be sufficient and necessary for payment of his just debts and legacies, or any part thereof, in case his personal estate should be insufficient for those purposes; and also such further sums of money as should from time to time be sufficient and necessary to pay any fines for the renewal of any lease or leases, or putting in any life or lives in the place of such as might happen to drop in such leasehold premises, or any part thereof; and that all such new leases should be vested in *Parker* and *Fox*, or the survivor of them, his executors, &c., upon the same trusts as he had before declared, concerning the leasehold premises; and that in case the several sums of money above mentioned, should be paid as they were wanted, by the person or persons to whom the immediate reversion or remainder of the premises expectant on the term of one thousand years should for

the

the time being, belong under his will, then the said monies should not be raised by virtue of the term, but the said term should cease for the benefit of such person or persons.

The testator then, after reciting that, by the will of *John Page*, late of *Putney*, Esq. deceased, several sums of money therein particularly mentioned, were given to his grandson, the testator's late son, *John Parker*, his executors or administrators, upon the contingencies in such will particularly expressed, declared that in case any sum or sums of money should become due and payable to, or vested in, the testator, (as executor of his said son,) or the testator's executors or administrators, by virtue of the said will, he bequeathed all such sum and sums of money, as he was, or might be entitled unto, or have a power of disposing of, unto *Henry Parker* and *Daniel Fox*, their executors, &c., upon trust, as soon as conveniently might be, after the said trust money should become vested in them, by virtue of his will, to invest the same in the purchase of freehold lands or hereditaments in the counties of *Worcester* or *Warwick*, which when purchased, should be conveyed to *Henry Parker* and *Daniel Fox*, or to some other proper trustees, and their heirs, upon the trusts and for the uses, &c., above declared, concerning his freehold estates. After farther reciting, that by virtue of the will and codicil of his said son *John Parker*, he might become entitled to certain devises and estates, by reason of certain forfeitures which would become vested in the testator, his heirs, executors and administrators, when such forfeitures should be incurred; the testator devised all the freehold and leasehold estates and hereditaments which he could or might be entitled to, by virtue of the will and codicil of his said son, or otherwise howsoever, to *Henry Parker* and *Daniel Fox*, their heirs.

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heirs, executors, &c. upon the trusts, and for the uses, &c. before declared, concerning his freehold estates.

The testator, after some pecuniary legacies, bequeathed the residue of his personal estate, to his daughters *Margaret* and *Ann Parker*, and appointed them executrixes.

By a codicil dated the 18th of *June* 1771, Sir *Henry*, in the event of the death of both his daughters *Margaret* and *Ann Parker*, without issue male, limited remainders to his daughters *Margaret Sophia Strode*, and *Catherine Garstin*, and their first and other sons in tail male, to take effect before the remainders limited by his will; and exempted his personal estate from the payment of his debts and legacies, " in order that it might go clear to his executrixes."

Sir *Henry John Parker*, died in *October* 1771, leaving his daughters *Margaret* and *Ann Parker*, *Margaret Sophia Strode*, and *Catherine Garstin*, his co-heiresses. On his decease, *Margaret* and *Ann Parker*, proved his will, and entered into possession of the estates devised to them by their father and brother.

Margaret Parker died in *May* 1785, unmarried, having by her will dated 1st *May* 1780, devised to her sister *Ann Parker* in fee, her moiety of certain estates in the counties of *Leicester* and *Northampton*, inherited by her and her sister from their mother, her moiety of the *Hatch* and other estates in *Wiltshire*, devised to her sister and herself, by their brother *John Parker*, and all other her estates; and appointed her sister residuary legatee and executrix.

On the death of *Margaret*, *Ann Parker* entered into possession

possession of the whole of the estates devised to her by her father, brother and sister. By her will dated the 1st of *August* 1811, she devised among other estates, the dwelling-house in *Salisbury* Court, to *John Joseph Dillon*, Esq., and his heirs, and the manor and mansion-house of *Talton*, the farm at *Tredington*, and her estates at *Hatch*, to *Harry Parker*, father of Sir *William Parker*, in fee, and appointed Sir *William Parker* executor of her will, with a legacy of 500*l.*, bequeathing the residue of her personal property to *John Joseph Dillon* and his sister.

Ann Parker died on the 26th of *January* 1814, unmarried, leaving *John Joseph Dillon* her heir at law, and Sir *William Parker* proved her will. The devise to *Harry Parker* lapsed by his death, in the life of the testatrix.

The bill, filed by Mr. *Dillon* against Sir *William Parker*, stated, in addition to these facts, that Sir *Henry John Parker*, having become embarrassed, applied to his son *John Parker*, for pecuniary assistance, proposing that his son should purchase his interest and reversion in the estates comprised in the settlement of 1741; that some agreement in writing was executed between them, for that purpose, in consideration of which, and of a conveyance of the estates to be made by Sir *Henry*, his son agreed to pay to him the sum of 700*l.*, and an annuity of 200*l.* during his life; that the sum of 700*l.* was accordingly paid, by means of which, Sir *Henry* was enabled to make an arrangement with his creditors; and that, in pursuance of that agreement, or some other to the like effect, *John Parker* entered into possession of all the lands described in the settlement, and occupied the mansion-house at *Talton*, which he fitted up at considerable expense, and paying or allowing all the

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the charges of housekeeping, resided there as the owner till his death; that he was also admitted into possession of the house in *Salisbury* Court, having expended 1500*l.* in rebuilding it; and that he paid other sums for repairs and improvements of the settled estates.

The bill prayed, a declaration, that Sir *Henry John Parker*, by accepting the benefits given to him by the will and codicil of *John Parker*, his son, elected and bound himself to conform thereto, in regard to the devises contained in the said will of the settled estates, and that the Plaintiff was entitled to those estates; and that the Defendant might be ordered to convey or release the same to the Plaintiff, and deliver up all title deeds, &c. relating thereto, and might be restrained by injunction, from proceeding at law, concerning the estates in question.

The Plaintiff also filed a supplemental bill, praying, that the Defendant might elect to take under or against the will of *Ann Parker;* and that the Plaintiff might be quieted in the possession of the estates at *Talton* and *Tredington;* and an account of the rents received and timber cut by the Defendant.

The answer stated, that the agreement between Sir *Henry John Parker* and his son, for conveying to the latter his father's interest in the settled estates, was subject to a proviso making it void in the event (which afterwards happened) of the death of the son in the life of his father; that the Defendant believed the articles of agreement had long been lost, and that Sir *Henry John Parker* always considered the will of his son as void, so far as it affected to devise the hereditaments in the county of *Worcester* and the house in *Salisbury* Court, and did not elect to take the benefits given to him

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him by that will in the manner in which they were thereby given: admitted, that Sir *Henry John Parker* died indebted, and that his legacies exceeded the amount of his personal estate, and were discharged by means of a mortgage of the leasehold estates, the sum advanced on which *Ann Parker* afterwards paid, taking an assignment to herself; insisted, that *Margaret* and *Ann Parker*, on the death of Sir *Henry*, took possession of the estates as his devisees, claiming under his will, and not under that of their brother, and in divers deeds and letters admitted that they claimed in that character; and the Defendant made title to the estates under the limitation in the will of Sir *Henry John Parker*.

The deeds and letters produced in support of the Defendant's allegation, that *Margaret* and *Ann Parker* had elected to take under the will of their father, are fully stated in the judgment.

The articles of agreement executed between Sir *Henry John Parker*, and his son, were not produced; the secondary evidence of their contents offered by the Defendant, was rejected by the Court.

Mr. *Hart*, Mr. *Bell*, and Mr. *G. Wilson*, for the Plaintiff.

The Plaintiff's claim is founded on the will of *John Parker*, by which a remainder in fee, (expectant on the decease of Sir *Henry John Parker*,) in the estates in question, is given to *Margaret* and *Ann Parker*; to the latter of whom, the survivor and devisee of her sister, the Plaintiff is heir at law. The agreement between Sir *Henry* and his son for conveying, as we insist, the absolute fee simple of these estates to the son, not being in evidence, can not be used by either party; but we contend that validity is given to the son's will by the acts of Sir

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Henry amounting to an election to take under it. It is a familiar principle of this Court, that he who accepts a benefit under a deed or will, must confirm the whole instrument, conforming to all its provisions, and renouncing every right inconsistent with them. *Noys* v. *Mordaunt* (*a*), *Cowper* v. *Scott* (*b*), *Streatfield* v. *Streatfield* (*c*), *Boughton* v. *Boughton* (*d*), *Villareal* v. *Lord Galway* (*e*), *Roberts* v. *Kingsley* (*f*), *Allen* v. *Poulton* (*g*), *Bigland* v. *Huddleston* (*h*), *Finch* v. *Finch* (*i*), *Macnamara* v. *Jones* (*k*), *Blake* v. *Bunbury* (*l*), *Wilson* v. *Lord John Townshend* (*m*), *Broome* v. *Monck* (*n*), *Thelluson* v. *Woodford* (*o*), an anonymous case before Lord *Rosslyn* (*p*), *Birmingham* v. *Kirwan* (*q*).

The first question in this case, therefore, is, whether Sir *Henry* elected to take under the will of his son? On that question the evidence is conclusive. By virtue of the will he possessed himself of the residuary personal estate of his son, executed a mortgage of one real estate, and received the rents of others, to none of which he had any other title; and no part of the debt, from the payment of which that will protected him, was ever paid. In addition to these unequivocal acts, the recitals of his own will are incontrovertible evidence of his intention to claim as devisee and legatee of his son. We admit that the Court would not hold a party bound by acts performed in ignorance of the existence, or of the value, of his respective rights; but there is no pretence of such ignorance in Sir *Henry*; nor can it be material that he

(*a*) 2 *Vern.* 581. (*b*) 3 *P. W.* 119. (*c*) *Ca. Temp. Talb.* 176.
(*d*) 2 *Ves.* 12. (*e*) *Amb.* 682. 1 *Bro. C. C.* 292, n.
(*f*) 1 *Ves.* 238. (*g*) 1 *Ves.* 121. (*h*) 3 *Bro. C. C.* 285, n.
(*i*) 4 *Bro. C. C.* 38., 1 *Ves. jun.* 534. (*k*) 1 *Bro. C. C.* 481.
(*l*) 4 *Bro. C. C.* 21. 1 *Ves. jun.* 514. (*m*) 2 *Ves. jun.* 693.
(*n*) 10 *Ves.* 609. (*o*) 13 *Ves.* 209., 1 *Dowe*, 249.
(*p*) Cit. 2 *Schoal. & Lefr.* 267. (*q*) 2 *Schoal. & Lefr.* 444.

survived

survived his son only two years; the extent of benefit which he took under the will, not the validity of his election, was affected by that event. He had already chosen the benefits secured to him by that will, which might be greater or less in proportion to the duration of his life.

The effect of election is to compel a renunciation o every title inconsistent with the instrument, the benefi of which the party elects to take. Claiming in one of . two inconsistent characters, he forfeits all the rights incident to the other; nor is it sufficient that he makes compensation to those whom his election disappoints; the consequence of election is forfeiture. Such is the doctrine of *Noys* v. *Mordaunt* (*a*); and though in some cases of pecuniary benefit (cases for example on the custom of *London*, the children of a freeman claiming either as legatees under the will, or under the custom as orphans,) the Court has proceeded on a comparison of quantity, only one instance occurs of a specific devise in which the doctrine of compensation has been adopted, *Streatfield* v. *Streatfield* (*b*); the accuracy of the statement of the directory part of the decree in that case may be reasonably questioned; it is certainly contrary to the opinion intimated by Lord *Eldon* in *Green* v. *Green* (*c*), and *Tibbits* v. *Tibbits*. (*d*) Sir *Henry John Parker* therefore taking the benefit of his son's will, renounced all rights in these estates, the assertion of which would have been inconsistent with its provisions. That election is conclusive on him, and on his representatives. The party having elected is not allowed at a future time to retract, and making compensation for

(*a*) 2 *Vern.* 581. (*b*) *Ca. Temp. Talb.* 176. See the decree extracted from the Register, *post* p.

(*c*) 2 *Mer.* 86. It was stated at the bar that this case ended in a compromise. (*d*) 2 *Mer.* 96.

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the benefits which he has enjoyed under the will, to assert rights inconsistent with it. *Harvey* v *Ashley* (*a*), *Butricke* v. *Broadhurst* (*b*), *Earl of Northumberland* v. *Earl of Aylesford* (*c*), *Stratford* v. *Powell* (*d*). In this instance compensation is impracticable; the parties cannot be placed *in statu quo*; the amount of the son's residuary personal estate cannot be ascertained, nor is there any fund from which compensation may be made.

Sir *Henry* being thus irrevocably bound to give effect to the will of his son, assumes a power to alter the disposition of the property, and by his own will attempts to reduce the estates in fee devised to his daughters *Margaret* and *Ann*, to estates for life only. That attempt is ineffectual. At Sir *Henry*'s death, *Margaret* and *Ann* were clearly entitled to the fee simple in these lands, under the limitations in their brother's will, to which Sir *Henry*, by his election, had given validity. To this point, therefore, the claim of the plaintiff is clear; but the Defendant retaliates the argument of election, and insists that *Margaret* and *Ann Parker* elected to abandon their rights under their brother's will, and abide by the will of their father. A most extraordinary election; to take a life interest in the very estates to the fee simple of which they were already entitled. Election supposes distinct benefits as objects of choice; but Sir *Henry*'s will conferred no benefit on his daughters; the answer admits that his personal estate was insufficient to discharge his legacies, and the inheritance of the freehold estates was already vested in *Margaret* and *Ann* by their brother's will. To such a case the doctrine of election is inapplicable; but the acts alleged by the Defendant

(*a*) 3 *Atk.* 607. (*b*) 3 *Bro. C. C.* 88., 1 *Ves. jun.* 171.
(*c*) *Amb.* 540. 657. S.C. under the title of *Earl of Northumberland* v. *Marquess of Granby*, 1 *Eden*, 489.
(*d*) 1 *Ball. & Beat.* 23, 24.

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are not sufficient to denote, in the daughters, an intention of recognising the validity of their father's will, and giving effect to it. Possession taken is for this purpose wholly insignificant: they were entitled to possession in all events; under their father's will as tenants for life, or under their brother's as tenants in fee. What act evinces their intention to take possession in the former character? But it is said, the deeds executed by the daughters amount to a confirmation of their father's will. The deeds were not executed *eo intuitu*: the object was to raise certain sums, or to ratify certain acts of the trustees. Such deeds will not be construed as amounting to a species of indirect and collateral confirmation, but their operation will be confined to the particular purpose for which they were executed. *Innes* v. *Jackson*. (a) No act of the daughters amounts to an explicit recognition of their father's will, and it is clear that they did not intend an election, or understand that they had elected, for they both assumed an absolute power of devising the estates. The devise of *Ann Parker*, the survivor and devisee of her sister, being defeated by the death of Sir *Harry Parker* in her life, the fee simple vests in the Plaintiff as her heir.

Sir *Sam. Romilly*, Mr. *Horne*, and Mr. *Shadwell*, for the Defendant.

The title under which the Plaintiff claims, if it now exists, existed forty-three years ago; and he requires this Court to enforce an equity, which on his own statement is most obscure, against an uninterrupted legal possession during that period. But his equitable claim is destitute of foundation. The will of *John Parker*, the

(a) 16 *Ves.* 356.; reversed on appeal, 1 *Bligh* 104., and see *Cholmondeley* v. *Clinton*, 2 *Mer.* 350—357, and the cases cited, p. 209. 233, 234. 27[illegible]. 32[illegible]., to which may be added *Baden* v. *Earl of Pembroke*, 2 *Vern.* 52. 213. 1 *P. W.* 281. and the *dictum Mos.* 257.

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son, raised no case of election. The Court never presumes that a testator intended to devise that which is not his; if he is entitled to estates which satisfy the words of his will, he is not understood as devising any other. Of that intention, clear evidence; as in *Pulteney* v. *Lord Darlington* (*a*), is required; and whether for that purpose, evidence *dehors* the will can be received, is an extremely difficult question. The will of *John Parker* contains no trace of a design to dispose of the property of his father. The first general words, "all his freehold and leasehold estates," denote no intention to give what was not his; the particular devise of the *Talton* estates occurs in a clause describing some estates *nominatim*, and concluding with a phrase qualifying every subject comprehended by the more extensive expressions interposed, "which had descended or come, or should descend or come to him, from his father;" the interest, therefore, which he intended to devise in the *Talton* estate, is either the interest which he had purchased under the agreement with Sir *Henry*, contingent on the event of survivorship, or the interest which without that agreement might descend to him as heir to his father. The context offers nothing to authorise the Court in inferring an intention to devise an interest which was not his own. Supposing that the will presented a case of election, there is no proof that Sir *Henry* elected. That he enjoyed benefits under the will, is indeed unquestionable; but he also asserted claims inconsistent with it; in the absence of direct evidence on either side, the case presents indirect evi-

(*a*) That case on the question of election is not reported, but is referred to in *Lady Cavan* v. *Pulteney*, 2 *Ves. jun.* 544., 3 *Ves.* 384. *Hinchcliffe* v. *Hinchcliffe*, 3 *Ves.* 516. *Pole* v. *Lord Somers*, 6 *Ves.* 309. *Druce* v. *Denison*, 6 *Ves.* 385.; and the proceedings are stated in the report of the appeal on the subsequent question of conversion. *Pulteney* v. *Earl of Darlington*, 7 *Bro. P. C. ed. Toml.* 530.

dence

dence on both sides; some acts denote an intention to take under the will, others, an intention to take against it. On what principle can circumstances thus equivocal, be construed into election? The Court must be satisfied, that he was apprised of the obligation to elect, and of the value of his different rights. *Wake* v. *Wake*. (a) The mere mortgage is not conclusive; in an unreported case relating to property near *Birmingham*, even the sale of the estate, was held not to constitute election.

Admitting that Sir *Henry* was bound to elect, and had elected to take against the will of his son, at the same time enjoying benefits under it, what is the effect of his election? An obligation to refund the two years' rents, and the personal estate which he had received by virtue of the will, and to pay the debt from which it exempted him. Electing to retain the estate against the will, he must make compensation for the benefits which he had taken under it. In *Dashwood* v. *Peyton*, Lord *Eldon* says, " Where a case of election is raised, it does not give a right to retain the thing itself; though it may give a right to compensation out of something else." (b) In this instance, the claim to compensation is nugatory; the Plaintiff being jointly with his sister, residuary legatee of *Ann Parker*, who was residuary legatee of her sister *Margaret*, and *Margaret* and *Ann* being executrixes and residuary legatees of Sir *Henry*, the Plaintiff is himself the owner of the fund from which compensation must be made.

The second question is decisive against the Plaintiff. Sir *Henry*'s will raised a case of election, and his daughters elected to take under it. They were his residuary legatees, and the Plaintiff cannot, at this period,

(a) 3 *Bro. C. C.* 255. 1 *Ves. jun.* 335
(b) 18 *Ves.* 49.

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be permitted to represent, that he left no personal property. The legal estate passed under Sir *Henry's* will to his devisees, and the enjoyment has been conformable to the legal right: had the daughters claimed in opposition to his will, they must have required a conveyance from the trustees. By numerous solemn acts, they recognised their father's will; acts amounting, if not to election, to acquiescence and confirmation. (*a*) It is not now competent to a remote relation happening to be heir, after the death of parties interested, and the loss of evidence, to question a disposition of property so confirmed: a disposition which they could not have impeached without a gross violation of good faith

June 2.

The MASTER *of the* ROLLS.

The claim of the Plaintiff is confined to the estates originally comprised in the settlement of *October* 1741, and for the purpose of establishing his title, the bill begins with stating, as the origin of it, the deeds of that date, by which the estates were conveyed to the use of Sir *Henry John Parker* for life, with remainder to his first and other sons in tail male, remainder to himself in fee. Under that settlement, therefore, on the death of *John Parker*, the son, without issue, the estates became the absolute property of his father Sir *Henry*; the Defendant claims as his devisee, and unless he had by some act deprived himself of the power of devise, the equitable estate would be, as the legal estate unquestionably is, effectually vested in the defendant. The Plaintiff, however, undertakes to prove that, in the actual circumstances, the will of Sir *Henry* is invalid, and that the estates pass by the will of *John Parker*, the son. For that purpose, two propositions must be esta-

(*a*) The substance of the argument for the defendant on this point, is fully stated in the judgment.

blished

blished, first, affirmatively, that Sir *Henry John Parker* had relinquished his right of disposition over his own estates, by making his election to abandon them, on accepting the benefits given to him by the will of his son; next, negatively, that the daughters, to whom Sir *Henry* devised a life interest in the estates to which, under their brother's will, they were already entitled in fee, never made an election to abide by the will of their father, in opposition to that of their brother. It being clearly admitted, that during the joint lives of the father and the son, the settlement (unless altered by contract) was the rule between those two parties; the father having possession, and the right of possession during his life, with a remainder in fee, the son had no title to the immediate enjoyment of the estate, unless he acquired it by an agreement with his father. The plaintiff has endeavoured to establish that such an agreement was concluded, and that Sir *Henry*, who appears to have been in embarrassed circumstances, for a sum of 700*l*., and an annuity, parted with his interest in the estate. It is in evidence that the son, after he attained the age of majority in 1766, actually occupied the house at *Talton*, expended considerable sums on the repairs of the house in *Salisbury* Court, and performed other acts which denote possession of the estate during the life of his father; payment of the sum of 700*l*. is not proved, and though both parties admit the existence of an agreement, neither has been able to produce it, or to offer to the Court satisfactory secondary evidence of its terms; one side representing it as an absolute surrender of his rights, by the father, the other, as qualified with a condition that the estate should revert to him in the event of his surviving his son. On this subject, the great lapse of time renders it impossible to ascertain the truth. I was of opinion, that the evidence tendered by the Defendant.

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fendant, of the existence, the loss, and the terms of the agreement, was not sufficient; the Court is, therefore, deprived of the light, which a knowledge of its contents would have afforded; but the Plaintiff, who is bound to establish a clear case, certainly cannot assume, without proof, that his statement is correct. Unless by the agreement, Sir *Henry* surrendered his reversion in fee, it would not enable the son to make an absolute disposition of the estate. Without knowing, therefore, the particulars of that transaction, the Court finds, as the first instrument proved in the cause, the will of the son, dated the 2d of *August* 1769, followed by a codicil of the 2d of *September* in the same year. By that will, *John Parker*, who had acquired considerable property as devisee and legatee of his grandfather *Page*, first devised to his father for life, all the estates of which he had power to dispose, and after a limitation in favour of his sisters of the whole blood, on which no question arises, he proceeds to give the *Talton* estates and other premises by name, concluding with a general description of a singular nature, "all his estates which had descended, or which should descend or come to him from his father;" an extraordinary reference, in an instrument executed during his father's life, to estates which had already descended from him; but the will was evidently prepared under a doubt, whether he should not survive his father; he provides for both events, nominating as his executor, his father if surviving, and substituting others in case of his death; and anticipating a descent which, in his apprehension, would render the devise valid, he gives the estates to his sisters of the half blood in fee. The Plaintiff, as their heir claims by this devise. *John Parker* died in *October* 1769, and under his will, supposing the settled estates to pass, (he seems to have imagined that he had power to dispose of them, and it may therefore be contended,

contended, that they are included in the first devise) Sir *Henry* became entitled to a life interest in those estates, (an interest which he had already), to a life interest in any other freehold estates of his son, and to the absolute interest in his personalty. By his codicil, the son devises to his father in fee, the *Arnscott* estate, acquired since the date of his will; and directs that his father's bond for the payment of 1000*l.* should be cancelled, and that his sisters should forbear all suit against his father, under the penalty of forfeiting the benefits conferred on them by his will.

In these circumstances it is insisted by the Plaintiff, that, after the death of his son, Sir *Henry* ought to have been put to his election; that the son having assumed to dispose of an estate which belonged to his father, to whom he had given valuable property, it was not competent to the father at once to take the benefit of the will, and to defeat it. From the undisputed principle, that no one can frustrate an instrument under which he claims, Sir *Henry* might clearly have been put to his election; but the Plaintiff maintains that he has actually elected. Supposing that election implies intention, a voluntary relinquishment by Sir *Henry* of the settled estates, an acceptance of the benefits given by the son at the price of renouncing his own property, and, as the term election seems to denote, a preference of one estate as matter of choice; is the fact of election so clearly established that the Court will be authorised in acting on that assumption? It seems difficult to prove all the circumstances necessary to constitute an election; that Sir *Henry* was apprised of the necessity of electing; that, knowing that he could not hold both the property to which he was previously entitled, and that which was given to him by his son, he voluntarily abandoned the former and took the latter. That he proved the will

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will of his son, and entered on the estates devised to him, is not sufficient. Did he not exercise dominion over his own estates as if the son had not devised them? Taking both estates, enjoying that which was his own, and also that given to him by his son, how can it be said that he relinquishes one and elects to take the other? Has he not rather elected to take both? It is clear that he thought the power of disposition which his son had assumed over his estates was in the actual circumstances inoperative; either that it was to take effect only in the event of the son's surviving, or that for some other reason he was not bound to submit to it; for in less than six weeks from the death of the son, in the next month after proving his will, on the 10th of *November* 1769, he makes his own, containing a full disposition of his estates, long and elaborate limitations, settling them on his daughters *Margaret* and *Ann* for their lives, with successive remainders to their issue and other branches of the family, not considering himself bound by the devise which his son had made to the same daughters in fee. That was not relinquishing the estates, but, as far as choice was concerned, asserting a right to dispose of them, and an actual disposition; the same solicitor prepares, and the same witnesses attest, both wills; evidently no one conceiving that one instrument deprived Sir *Henry* of the power to make the other. With reference to intention, therefore, the evidence contained in these transactions, of his intention to retain his own estate, is at least as strong as the evidence of his intention to accept the property given to him by his son, derived from the mortgage and other acts of ownership exercised over it; how then can the Court declare that he elected to take one and renounce the other? The utmost that can be contended is that he has no right to enjoy both; that he was bound, and that the daughters might have compelled him, to make an elec-

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tion; but they took no measure for that purpose: and in the short interval, about two years, which elapsed between the death of his son and his own, the acts of Sir *Henry* are equivocal, manifesting as much design to retain one estate as to accept the other.

The point made by the plaintiff is, that acceptance binds, and operates forfeiture without reference to intent. It is said that Sir *Henry* accepting his son's gift, by that act renounced his own estate; that is not election, but forfeiture: if such is the effect of acceptance, even though in ignorance that it was not competent to the party to retain both benefits, but that on taking one, the consequence of law was that he renounced the other, then, by inadvertence without choice, an estate may be lost; but in all cases of election the Court is anxious, while it enforces the rule of equity, that the party shall not avail himself of both his claims, still to secure to him the option of either; not to hold him concluded by equivocal acts performed perhaps in ignorance of the value of the funds; a principle strongly illustrated by the decision in *Wake* v. *Wake*. The rule of the Court is not forfeiture but election; *utrum horum*. What acts will amount to election, what length of time, is matter of more doubt. (a) If I am to determine it as a question

(*a*) A party bound to elect is entitled first to ascertain the value of the funds. *Newman* v. *Newman*, 1 *Bro. C. C.* 186. *Boynton* v. *Boynton*, 1 *Bro. C. C.* 445. *Wake* v. *Wake*, 3 *Bro. C. C.* 255, 1 *Ves. jun.* 335. *Whistler* v. *Webster*, 2 *Ves. jun.* 371. *Chalmers* v. *Storil*, 2 *Ves. & Beam*, 222. *Hender* v. *Rose*, 3 *P. W.* 124, n. And for that purpose may sustain a bill to have all necessary accounts taken, *Butricke* v. *Broadhurst*, 3 *Bro. C. C.* 88, 1 *Ves. jun.* 171. *Pusey* v. *Desbouverie*, 3 *P. W.* 315. And election, under a misconception of the extent of claims on the

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of fact, I feel great difficulty in saying that Sir *Henry* ever meant, or even thought that he was bound to elect; whether

the fund elected, is not conclusive. *Kidney* v. *Coussmaker*, 12 *Ves.* 136.

What acts of acceptance or acquiescence constitute an implied election, must be decided rather by the circumstances of each case than by any general principle. The questions are, whether the parties acting or acquiescing were cognisant of their rights; whether they intended election; whether they can restore the individuals affected by their claim to the same situation as if the acts had never been performed: or whether, (on the principle *interest reipublicæ ut sit finis litium,*) these inquiries are precluded by lapse of time. The following are some of the principal authorities: *Ardesoife* v. *Bennet*, 2 *Dick.* 463. *Wilson* v. *Lord John Townshend*, 2 *Ves. jun.* 693. *Butricke* v. *Broadhurst*, 3 *Bro C. C.* 88. 1 *Ves. jun.* 171, 336, n. *Wake* v. *Wake*, 3 *Bro. C. C.* 255., 1 *Ves. jun.* 335. *Earl of Northumberland* v. *Earl of Aylesford*, *Amb.* 540. 657., 1 *Eden*, 489. *Rumbold* v. *Rumbold*, 3 *Ves.* 65. *Bor* v. *Bor*, 3 *Bro. P. C. ed. Toml.* 167. *Simpson* v. *Vickers*, 14 *Ves.* 341. *Welby* v. *Welby*, 2 *Ves. & Beam.* 200. *Stratford* v. *Powell*, 1 *Ball & Beat.* 1., and see 2 *Ves.* 593. 668., 3 *Atk.* 616. *Griffyn* v. *Griffyn*, 3 *Barnard.* 391., 2 *Schoal. & Lefr.* 268. The decision of the House of Lords in the *Duke of Montagu* v. *Lord Beaulieu*, 3 *Bro. P. C. ed. Toml.* 277. reversing Lord *Northington*'s decree, *Amb.* 533. has been frequently disapproved, 3 *Bro. C. C.* 88. 281. 1 *Ves. jun.* 172. 336. 5 *Ves.* 483, 484., but see 14 *Ves.* 348. The question of election if doubtful, may be sent to a jury. *Roundell* v. *Currer*, 2 *Bro. C. C.* 73. *post* p. 383.

It seems that acts by which the party himself would not be bound, may bind his representatives; on the principle of "not disturbing things long acquiesced in by families, upon the foot of rights, which those in whose place they (the representatives) stand, never called in question," *Confer.* 2 *Ves.* 593. 525. If in satisfaction of previous claims, a benefit is given to a parent, and after his decease to his children, the children are not bound by the election of the parent; *Ward* v. *Baugh*,

whether his acts would have concluded him, had his daughters insisted during his life that he had made his election

v. *Baugh*, 4 *Ves.* 623., and see *Long* v. *Long*, 5 *Ves.* 445., and the reasoning of the Court in *Forrester* v. *Cotton*, *Amb.* 388., 1 *Eden*, 532. Under a covenant on marriage to purchase and settle lands worth 400*l.* a-year, to the use of the covenantor for life, remainder to his wife for life, remainder to the heirs of their bodies, with election to the wife, if the husband died before a settlement, to take either the 400*l.* a-year, or 3000*l.* in lieu of dower and thirds; the husband dying before a settlement, although the wife elected, to take the 3000*l.* a settlement of 400*l.* *per annum* on her for life, with remainder to the children, was decreed against creditors. *Hancock* v. *Hancock*, 2 *Vern.* 605.

Election, on the part of an adult, may be compelled, by a direction, (in the decree on the original hearing,) that if he neglects or refuses to signify his election within a time limited (six months), he shall be understood as electing to assert his rights paramount to the instrument which imposes the obligation of election. See the decree in *Streatfield* v. *Sreatfield* from the Register, *post* p. . (C.)

The following note of the judgment in *Roundell* v. *Currer*, cited *ante* p. 382, affording a better view of the reasoning than the printed report, is extracted from the very valuable collection of MSS. for the use of which, the editor is indebted to the kindness of *Master Cox*.

MASTER *of the* ROLLS.

The important question in this cause is, whether the remainder in fee, which the defendant claims as right heir of *Dorothy Richardson*, is not liable to be conveyed to the plaintiff, and the other persons claiming under the will of *John Richardson?* Much stress has been laid on the election, and argued whether the acts done by *Henry Richardson* amount to such election; but I do not think this is a question of election, for if I did, I should send it to a jury, to determine the fact, whether such election was made. It would be

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election, is a very different inquiry; but it may be doubtful, whether on his death the daughter, had any farther

be more accurate to state the question to be, whether *Henry Richardson* did all which he was required to do, to entitle himself to the benefit. under the will of *John Richardson?* The general plan of *John Richardson*'s will, was, that before *Henry* should be entitled to *John Richardson*'s real estates, he should settle the e tate which he took from *Sarah Currer,* according to the limitations there mentioned. The means of doing this are specified in the will. I will not say whether any other means except suffering a recovery would have satisfied this will. I doubt whether even levying a fine would have done. It is said, that a fine might possibly have been equivalent; but if there had been any specific incumbrances affecting the reversion, a fine would have let them in: however, I will not take upon myself to decide this question, as no fine has been levied. The apology for *Henry Richardson* not suffering a recovery, has been, that his death happened so soon after the death of *John Richardson*, as to deprive him of the opportunity; and it is said, that where a condition becomes impossible, it is gone and extinguished; but this is not true in law. If lands are given to A., on condition that A. shall enfeoff B. of other lands, and B. refuse livery of seisin, A. cannot help himself. In the present case, the great ground upon which I form my opinion is this, that the estates of *John Richardson* were to be conveyed to *Henry Richardson*, on certain terms, which amounted to a fine to be paid by *Henry* for them. Before he could take the estates of *John*, he was bound by some means or other, at all events, to settle *Sarah Currer*'s estates according to the will of *John Richardson*. It has been argued, that nothing was wanting but the actual execution of deeds, and that what *Henry* did, would in equity amount to a conveyance. It is not necessary to decide what would have been the consequence if *Henry* had been tenant in fee; but in this case, there was an estate tail in existence, and it was absolutely necessary to bar the issue male by a recovery. It is then argued, that in the event which has happened, the estate tail is gone; but I cannot think this a fair argument: the

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farther right than that of requiring his representatives to make their election. On that point, the Court has intimated a disposition to hold, that if the representatives of those who were bound to elect, and who have accepted benefits under the instrument imposing the obligation of election, but without explicitly electing, can offer compensation and place the other party in the same situation as if those benefits had not been accepted, they may renounce them, and elect for themselves. (*a*) If, therefore, immediately on his death it had been contended that Sir *Henry* had elected, and was bound to relinquish the settled estates, it would have been a question, whether his representatives might not have claimed a right to make their own election, rendering satisfaction for the benefits which he had enjoyed. This first part of the case is full of difficulty. The Plaintiff, who desires the Court to deprive the Defendant of his legal estate, is bound to establish an indisputable title; he must show that the son pos-

wife was enseint, and the child might have proved a boy; if that had been the case, *Henry Richardson* certainly, would not have done sufficient, and this cannot be struck out of the argument; for before *Henry* had paid the price required of him by *John Richardson*'s will, he must have done so much as to have put it out of the reach of any possible event to defeat the intention of *John Richardson* as to the other estate, for he never had acquired such an interest in *Sarah Currer*'s lands, as to bind them in all events; and I am, therefore, of opinion, that he has not performed the conditions required of him. I will not say, that a recovery was absolutely necessary, (though I rather incline to think so,) but at all events, he should have acquired such an absolute property in *Sarah Currer*'s lands as to have barred [illegible] and I, therefore, declare that [illegible] is not bound [illegible] of *John Richardson*.

(*a*) [illegible]

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sessed power to devise the estate, or that Sir *Henry* elected to abide by his will; the bill is not framed for the purpose of putting Sir *Henry*'s representatives to election, and the fact of election by him is negatived by his will made immediately after the death of his son. The argument which represents lapse of time and acts performed as conclusive, without regard to intent, is subject to great difficulties.

These difficulties, the second point in the case renders it quite unnecessary to encounter; for, assuming that Sir *Henry* made his election to abide by the will of his son, may not every argument which establishes that conclusion be applied with tenfold force to the conduct of the daughters after his decease? By his will of the 10th of *November* 1769, Sir *Henry* devised all the estates to which he was entitled, including therefore the *Arnscott* estate and the leaseholds, to trustees to the use of his daughters, *Margaret* and *Ann*, for life, with remainder to their issue, and ulterior remainders to other branches of the family; but, in preference to all these limitations, he created a term of 1000 years for raising a sum to defray his debts and legacies; and his codicil expressly states, that that sum was to be applied in exoneration of his personal estate, in order that it might go free to his executrixes, *Margaret* and *Ann*, the primary objects of his bounty. These instruments, therefore, import to confer on his daughters very considerable benefits, both real and personal. The second codicil was dated the 18th of *June* 1771, and Sir *Henry* died on the 8th of *October* following. Then, at the latest, his daughters were put to their election; for it is quite clear that they were then, if ever, entitled to the settled estates in fee under the will of the son, and to a life-interest only in the same estates under the will of their father. If they claimed under the latter, they were entitled also to Sir *Henry*'s personalty,

and

and to a life interest in the *Arnscott*, and in any other real, estate of which he was seised.

It is difficult to suppose that, situated as they were, they would omit to have recourse to professional assistance for information; an opinion was, in fact, given that they were bound to elect; but without adverting to that circumstance, the probability is, that they were apprized of their obligation. Knowing then that they must elect, what election have they made? Have they claimed under the will of their father, or of their brother? On this subject every principle of argument used to induce the Court to pronounce, as matter of fact, an election, in the first instance, by Sir *Henry*, concurs to prove that the daughters elected to abide by his will, and reject that of the son; for it is established, not upon mere presumption, but by direct proof, that they expressly and unequivocally renounced their character of devisees in fee, and adopted the character of devisees for life. Sir *Henry* never explicitly abandoned his own estate; that dereliction is alleged only as matter of inference from his acceptance of the alternative benefits; but the daughters, adult and competent, by a series of explicit deeds, assume the estates devised by their father in the character of tenants for life constituted by that devise; a title totally inconsistent with their claim as tenants in fee of the same estates under the will of the son.

Their first act towards determining the question, whether they were tenants for life, under the will of their father, or tenants in fee, under that of their brother, is the execution of certain deeds, dated the 14th and 15th of *April* 1772. It had become necessary to raise the sum of 1100l. for paying a fine to the Bishop of *Worcester*, on renewing the lease of that part of the settled estates which was leasehold; two of the lives, on which

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the existing lease was held, having failed. Sir *Henry*'s will created the term of one thousand years for the express purpose of raising money to pay the fines on renewal. The Plaintiff in the character of heir of the two daughters, and having no right which they had not, insists that this will, and, therefore, the term which it attempted to create, is void *quoad* the settled estates. What is the first act to show that the daughters so considered it? These deeds of *April* 1772, executed by both *Margaret* and *Ann*, in which they begin by describing themselves as devisees for life, under their father's will; and in which, the trustees of the term are joined, as having the interest in the term, by the description of trustees named in the will of Sir *Henry John Parker*; an open assumption of the character of devisees for life, and recognition of their father's will as a valid instrument. To whom is the right of redemption reserved? It may be said, that the daughters concurred in the mortgage only for the purpose of raising money, and that, subject to the claim of the mortgagee, their interest remained unchanged. On that supposition, they alone were entitled to redeem; but the right of redemption is expressly reserved to them, *or the persons entitled under the will of Sir* Henry. Can that reservation be reconciled with the argument, that the right to redeem belonged absolutely to the daughters, and could not belong to any one by virtue of that will? The deeds contain a covenant that, as long as the interest is regularly paid, the persons entitled under the will and codicil of Sir *Henry* shall quietly enjoy; another direct acknowledgment of his will as the rule of property. These deeds executed under the hands and seals of the daughters, in the year ensuing the death of their father, are a strong manifestation of their intent to adopt the character of devisees for life, and to admit all the disposition which their father had made of their estates.

If

If such was their choice, however contrary to their interest, those claiming under them are bound by it.

Next follow the deeds of the 21st and 22d of *May* 1773, to which *Margaret* and *Ann* are parties, reciting that Sir *Henry John Parker* had mortgaged the *Arnscott* estate, which he took under the codicil of his son, (a life-interest in the equity of redemption, having been devised by Sir *Henry* to *Margaret* and *Ann*, who had no title to it, except from his will,) and conveying that estate to a purchaser, who had discharged the original mortgage, and advanced an additional sum, constituting a total of 1350*l.* as the price. These deeds, one transferring the fee, and the other the term of 1000 years, afford unequivocal evidence of the election of the daughters to take that estate, and to take it as devisees for life; a manifest assumption of property by virtue of their father's will. It is material also to recollect, for what purpose the money was raised. After payment of the mortgage, a surplus of about 400*l.* remained, which, added to the sum of 2980*l.* obtained by the subsequent mortgage of Sir *Henry*'s estate, was applied in discharge of his debts and legacies. It has been said, that he left no personal estate; but it clearly appears, that that sum of about 3300*l.* constituted (with the single exception of one debt of 5*l.*) the amount of his debts and legacies, and being thus defrayed from his real estate, if Sir *Henry* left any personal property whatever, any articles of furniture, &c., the whole devolved without deduction, to his residuary legatees. In *March* 1775, follows the mortgage to which I have referred, for raising the sum of 2980*l.* on the security of a long term of years, with a like reservation of the equity of redemption; the estates being evidently considered as passing under the will of Sir *Henry*, unaffected by that of his son. Here, therefore, are repeated

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deeds, all treating the father's will as a valid instrument, by which his daughters chose to abide. This mortgage having been assigned in 1777, was again assigned on the 21st of *June* 1794, to Doctor *Kenrick*, in trust for Mrs. *Ann Parker*, recognising, in the strongest way, the validity of the title under which it was made. In *April* 1798, by another deed, to which Mrs. *Ann Parker* is a party, reciting that *Margaret* and *Ann*, as devisees for life, had paid out of the rents all interest due, the mortgage is once more assigned. On the 21st of *April* 1777, a deed was executed by both the sisters, describing them as devisees for life of the estates devised by Sir *Henry*; a deed of indemnity, ratifying all antecedent conveyances, and all acts done in furtherance of the will of their father; executed by all parties, to prevent dispute and litigation. Can it be doubted then, that they designed to give validity to the transactions under his will?

It has been insisted, that all this is confirmation of particular acts only: partial recognition, as in the case stated by Sir *William Grant*. (a) That case has no application

(a) 2 *Mer.* 353. The following note of what passed on the motion for a new trial in this case, in some respects more full than the printed report. 2 *P. W.* 563. is taken from a MS. in the possession of the editor.

COKER *v.* FAREWELL.

10th *February* 1729. Motion for a new trial upon an issue directed out of this Court. By the decree two issues were directed; 1st, whether Plaintiff at the time of executing a general release, was apprised of her right to the remainder of the estate in question, expectant upon an estate tail; 2d, whether she did not intend by the said release to convey the remainder to tenant in tail by the release.

There was a trial at assizes, and a verdict for the Plaintiff, who

application to the present. The parties here, were cognisant of their rights, professional advice had been taken

who brought the bill to set aside the release, *quoad* this remainder, as obtained by surprise.

Price J. who tried the cause, made a special certificate, stating the facts in a doubtful way, but concludes against a new trial, because a material witness died since the trial. But, however, upon application to the Court of Chancery, a new trial was granted, with special directions that the Plaintiff should be at liberty to read the depositions of this witness taken in Chancery, and to give evidence of what he swore at the former trial, at the new trial. (*a*) This second trial was at the bar of the Court of Common Pleas, and a verdict for Defendant *Farewell*. Now Plaintiff moved for a new trial, there being verdict against verdict; and it would be hard for an inheritance to be bound by one verdict.

Jekyl, Master of the Rolls. Of opinion there should not be a new trial; the judges of the Common Pleas certifying that the verdict was not against evidence, though there was strong evidence on the other side, and room for the jury to find either way, and if they had found for the other side, they could not have found fault with the verdict. It is true this Court will not bind an inheritance upon one verdict, where the title is properly a title at law; but in the present case, the matter in issue is properly a matter in equity, founded upon the intention of the parties, and not upon the operations of law; for it is admitted the release is sufficient at law, to pass the legal estate, and the bill is to be relieved against the operation at law of this release, and to restrain it in equity by the intention of the parties, which is properly a point of equity; and in matters of equity, an issue directed, is only directed to try the fact, to inform the

(*a*) Coker *v.* Farewell. M. 3. G. 2. C. B.

The Court of Chancery ordered a new trial at bar, C. B., and one of the witnesses being dead, who gave evidence at the former trial, the Court of Chancery directed that evidence of what he said at the first trial, should be given by hearsay; and so it was done. Serjeant *Hill's* MSS. 3 D. 111.

 conscience

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taken on the subject, the deeds were not executed in ignorance, nor are they equivocal. It cannot be contended, that they were not meant for the purpose of declaring the intention of the daughters, that their father's will should be established. *Margaret Parker*, the

conscience of the Court, and not to try the right of the parties, as where the matter in issue is a legal title; and one verdict may be sufficient to inform the conscience of the Court; and the Court, if satisfied of the fact, upon the depositions in the cause, need not direct an issue at all, but make a decree without it. This decree is not to bind the inheritance, but only to enjoin the party from making use of this release any farther than it was intended, and leave the legal title at large.

As to verdict against verdict, he said the last verdict was at a trial at bar, which is the most solemn trial, and it is not usual to grant a new trial, after a trial at bar, unless the Court be very clear and strong against the verdict, which is not the present case, for the judges are far from certifying the verdict to be against evidence, but admit the evidence to be sufficient, though there was much evidence on both sides; which is only to say, it was a doubtful point; and since this fact has undergone strict examination of so solemn a trial, where there is not pretended to be the least surprise on either side, but both parties come well prepared, and with their full strength, I think such a trial and verdict sufficient to inform the conscience of the Court, and a good foundation for a decree in equity, upon a point of equity, which does not determine or bind the legal title to the inheritance. No new trial.

King, Chancellor, of the same opinion, that after a solemn trial at bar, a verdict supported, or at least not contrary to evidence, is sufficient to inform the conscience of the Court, of a fact upon which the equity is to arise, and it is not like a trial directed out of this Court upon a legal title; there it may be reasonable not finally to conclude the parties upon one trial; in this case, if the Court were satisfied of the fact, they might make a decree without any trial at all.

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the elder daughter, died in 1785, having devised to her sister, all her property, specifying one moiety of the *Hatch* estate, which she derived from her brother; a specification affording tolerably strong evidence, that she possessed a knowledge of her brother's will. In 1811, *Ann Parker* devised the *Talton* estate to the person who would been entitled to it under the will of Sir *Henry*; the Plaintiff claiming, not by any intention of the testatrix in his favour, but as her heir, on failure of the devise. These acts, it may be said, show a disposition to abide by the will of the son; but when in so many other transactions with third persons, the daughters had recognised their title as devisees for life, could they after so long an interval, assume another character? Can the Plaintiff, insisting that it was not competent to Sir *Henry*, to claim against his son's will at the expiration of a month from his death, maintain that in 1811, after the lapse of forty years, Mrs. *Ann Parker* might, in defiance of these repeated deeds,

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COKER *v.* FAREWELL.

18 *December* 1729.

On motion for a new trial, Ordered "that the parties should be at liberty to attend the justices of the Court of Common Pleas, upon the matter of the said trial at bar, lately had of the issues directed in these causes, and to desire them to certify whether, by any thing appearing at the said trial, there is any reason to grant a new trial, and whether they are of opinion, any new trial ought to be had of the said issues or not." Reg. Lib. A. 1729. fol. 62. 10 *February* 1730. "His Lordship now declaring that he had received a certificate by word of mouth, from the Lord Chief Justice of the Court of Common Pleas, relating to the said last trial, upon hearing, &c. his Lordship declared that he did not see any cause for granting a new trial." Reg. Lib. A. 1729. fol. 200.

assert

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assert her claim under the will of the son? The letters of Mrs. *Ann Parker* to Sir *Harry Parker*, concur to prove that she elected to take under her father's will. (*a*)

On this evidence, I am of opinion, that the Plaintiff has not established the second proposition on which his title depends, namely, that the daughters never elected to take under their father's will. I cannot pronounce the equitable right of the Plaintiff, which, if it exists at all, existed in those ladies forty years ago, so clearly proved, as to authorise me to make the declaration prayed against the legal estate of the Defendant. That legal estate has constantly remained with the title, which the Plaintiff seeks to impeach, by establishing a disposition, the validity of which requires the supposition of facts, of which I find no sufficient evidence. So much of the bills, therefore, must be dismissed. With respect to the supplemental bill, which calls on the Defendant to make his election of taking under or against the will of Mrs. *Ann Parker*, and, if he retains the house in *Salisbury* Court, to relinquish the legacy of 500*l*., to that relief the Plaintiff is entitled. (*b*)

After concluding his judgment, the Master of the Rolls, referred to *Cooks* and *Hellier* (*c*), as a case in which the party was bound by the title which he had assumed.

" His

(*a*) The Master of the Rolls here read her letters of the 10th of *March* 1800, and the 8th of *September* 1806.

(*b*) The doctrine of election originates in inconsistent or alternative donations; a plurality of gifts, with intention, express or implied, that one shall be a substitute for the rest. In the judgment of tribunals, therefore, whose decision is regulated by that intention, the donee will be entitled, not to both benefits, but to the choice of either. The second gift

(*c*) 1 *Ves*. 234.

is

" His Honour doth order, that the Plaintiff's bills, (except so much of the supplemental bill, as prays that

is designed to be effectual, only in the event of his declining the first; and the substance of the gifts combined is an option.

If the individual to whom, by an instrument of donation, a benefit is offered, possesses a previous claim on the author of the instrument, and an intention appears that he shall not both receive the benefit and enforce the claim, the same principle of executing the purpose of the donor, requires the donee to elect between his original and his substituted rights; the gift being designed as a satisfaction of the claim, he cannot accept the former without renouncing the latter. (*a*)

A new modification of the doctrine arises on the occurrence of gifts of a peculiar nature. The owner of an estate having in an instrument of donation, applied to the property of another, expressions which, were that property his own, would amount to an effectual disposition of it to a third person, and having by the same instrument disposed of a portion of his estate in favour of the proprietor whose rights he assumed, is understood to impose on that proprietor the obligation of either relinquishing, (to the extent at least of indemnifying those whom, by defeating the intended disposition, he disappoints), the benefit conferred on him by the instrument, if he asserts his own inconsistent proprietary rights, or if he accepts that benefit, of completing the intended disposition by the conveyance in conformity to it of that portion of his property which it purports to affect. The *foundation* of the doctrine is still the intention of the author of the instrument; an intention which extending to the whole disposition, is frustrated by the failure of any part; and its *characteristic*, in its application to these cases is, that by equitable arrangement effect is given to a donation of that which is not the property of the donor; a valid

(*a*) Some of the principal cases on the subject of satisfaction, are collected *ante* p. 222, n.

gift,

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that the Defendant may elect, whether he will take under or against the will of *Ann Parker* in the pleadings

gift, in terms absolute, being qualified by reference to a distinct clause, which though inoperative as a conveyance, affords authentic evidence of intention. The intention being assumed, the conscience of the donee is affected by the condition, (though destitute of legal validity,) not express but implied, annexed to the benefit proposed to him. To accept the benefit, while he declines the burthen, is to defraud the design of the donor.

The doctrine of election, in common with many other doctrines of our courts of equity, appears to be derived from the civil law. In that system, a bequest of property which the testator knew to belong to another was not void, but entitled the legatee to recover from his heir, either the subject of the bequest, or, if the owner was unwilling to part with it at a reasonable price, the pecuniary value. (*Inst. lib.* 2. *tit.* 20. *s.* 4. *tit.* 24. *s.* 1. *Dig. lib.* 30. *l.* 39. *s.* 7. *l.* 104. *s.* 2. *l.* 71. *s.* 3. *lib.* 32. *l.* 30. *s.* 6.) It was also competent to the testator, by express direction, (originally in the form of *fidei commissum*, at a later period in terms of gift, under the denomination of *legatum ab aliquo*) to impose the obligation of providing the bequest or its value, on any person deriving a benefit under his will. (*Dig. lib.* 32. *l.* 1, *s.* 6. *l.* 14, *s.* 2. *Cod. lib.* 6 *tit.* 37. *l.* 10. *tit.* 42. *l.* 9.) to the extent of that benefit. (*Inst. lib.* 2. *tit.* 24. *s.* 1. *Dig. lib.* 30. *l.* 114. *s.* 3.) But a bequest, on the erroneous supposition that the subject belonged to the testator was, it seems, void; (*Inst. lib.* 2. *tit.* 20. *s.* 4. *Dig. lib.* 31. *l.* 67. *s.* 8.) unless the legatee stood in a certain degree of relation to the testator, (*Cod. lib.* 6. *tit.* 37. *l.* 10.) or the subject was the property of the heir. (*Dig. lib.* 31. *l.* 67. *s.* 8. *Cod. lib.* 6. *tit.* 42. *l.* 25.)

In every instance, the heir or legatee possessed the option of accepting or renouncing the inheritance or legacy thus burthened; but it seems that no medium was permitted between these

ings named), do stand dismissed out of this Court; and the Defendant Sir *William Parker*, by his counsel, now

these alternatives; no text has occurred recognising the right of the heir or legatee at once to accept the benefit offered by the will, and to retain the property of which it assumed to dispose, on the terms of compensation or indemnity to the disappointed claimant. The effect, therefore, of election to take in opposition to the will was forfeiture of the benefit offered by it. The effect of election to take under the will varied, as the property of which the will assumed to deprive the legatee was pecuniary, or specific; in the former case, he was compelled to perform the bequest to the extent of the principal and interest which he had received; in the latter, a peremptory obligation was imposed, to deliver the specific object, though exceeding the amount of the benefit conferred. (*Dig. lib.* 31. *l.* 70. *s.* 1.)

In the following decisions, the reader will recognise the doctrine of election, applied in circumstances constituting what in our courts of equity are technically denominated cases of satisfaction. Cum pater pro filia sua, dotis nomine, centum promisisset, deinde eidem centum eadem legasset, doli mali exceptione heres tutus erit, si et gener ex promissione, et puella ex testamento agere institueret; convenire enim inter eos oportet, ut alterutra actione contenti sint. (*Dig. lib.* 30. *l.* 84. *s.* 6.)

Lucius Titius, cum duos filios heredes relinqueret, testamento ita cavit; Quisquis mihi liberorum meorum heres erit, ejus fidei committo, ut si quis ex his sine liberis decedat, hereditatis meæ bessem, cum morietur, fratribus suis restituat; frater decedens fratrem suum ex dodrante fecit heredem; Quæro an fideicommisso satisfecerit? Marcellus respondit, id quod ex testamento Lucii Titii fratri testator debuisset, pro ea parte, qua alius heres extitisset, peti posse, nisi diversum sensisse eum probaretur: nam parvum inter hanc speciem interest, et cum alias creditor debitori suo extitit heres: sed plane audiendus erit coheres, si probare possit, ea mente testatorem heredem instituisse fratrem suum, ut contentus institutione fideicommisso abstinere deberet. *Dig. lib.* 30. *l.* 123. *pr.*)

By

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now electing to take against the will of the said *Ann Parker*, the premises in *Salisbury* Court, *London*, therein mentioned,

By the civil law the doctrine of election seems to have been confined to wills, and in that application it originated in English jurisprudence. One of the earliest instances of interference by a court of equity to restrain the assertion of a legal claim, by reason of its inconsistency with the intention expressed or implied in an instrument conferring a benefit on the claimant, is *Lacy* v. *Anderson*, in the reign of *Elizabeth*. "The suit is to stay a suit at law in a writ of dower made by the Defendant, for that the Defendant's wife had certain copyhold lands devised unto her in lieu of her thirds at law, which she accepted of and enjoyed twenty years, and yet seeketh now to recover dower of the freehold lands. The Defendants demurred, because copyhold lands can be no bar of dower. But the Court thinks it no conscience she should have both; therefore ordered to answer. *Lacy et Uxor*, Plaintiffs, *Anderson et Uxor*, Defendants. *An.* 24 *El.*" (*Choice Cases in Chancery*, p. 155, 156.) A copy of the entry in the Register is subjoined *post* p. . (A.) In an earlier case contained in the same collection, (*Rose* v. *Reynolds*, 23 & 24 *Eliz. Choice Cases*, 147, see the extract from the Register, *post* p. . (B.)), the Court assumed jurisdiction upon the principle that dower was barred in equity by acceptance of a benefit designed as a recompence, though not constituting a bar at law.

The application of the general rule to compel election, in the instance of devises to the testator's widow, between her claims as devisee and as dowress, underwent repeated discussion in the well-known case of *Lawrence* v. *Lawrence*; a summary of the proceedings, the record of which lies dispersed through many volumes, may form a convenient transition from these early authorities to the more familiar series of decisions in which the doctrine is embodied. *William Lawrence* being seised in fee of estates of the annual value of 550*l.*, devised a manor and other lands worth about 130*l.* *per annum*, to his wife during her widowhood, and, on the determination of that estate, he devised the premises, and all his other lands to trustees on trusts specified;

and

mentioned, to be devised to the Plaintiff, His Honor doth declare, that the Defendant is bound to relinquish the

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and directed that, after two years of a term of twenty-four years created by the will were expired, his wife should receive the rents of certain lands worth about 60*l. per annum*, and, after five years, the rents of other lands worth about 90*l. per annum*, during the remainder of the term, if she remained a widow; and bequeathing to her several specific and pecuniary legacies, appointed her executrix. The widow having recovered judgment in a writ of dower, (*Lawrence* v. *Dodwell*, Lord *Raym.* 438. *Lutw.* 734,) the remainder-man exhibited a bill to be relieved against that judgment, and to have the trusts of the will performed. In *November* 1699, Lord *Somers*, being of opinion that the devise was intended in satisfaction of dower, and that a collateral satisfaction might be a bar in equity, decreed that the widow must wave either the dower or the devise. (*Lawrence* v. *Lawrence*, 2 *Vern.* 365, 2 *Freem.* 234.) In *July* 1701, Lord Keeper *Wright* reversed that decree, declaring that nothing in the will denoted an intention to bar dower; and that if "any such thing did appear by the will, the same would be only a bar at law, and not in that Court," and the matter had been already determined at law. (3 *Bro. P. C. ed. Toml.* 484, 2 *Freem.* 235.) In *December* 1715, Lord *Cowper*, (on a bill filed by a subsequent remainder-man, whose title had accrued in the interval) declared that the point of dower being a point of right, and so doubtful in its nature, as that the Court had been of different opinions therein, he would not vary the last determination, having remained so long unquestioned. (3 *Bro. P. C. ed. Toml.* 485.) In *May* 1717, the House of Lords affirmed Lord *Cowper*'s decree, and dismissed the bill so far as concerned the question of dower. (3 *Bro. P. C. ed. Toml.* 483.)

On this case Sir *Thomas Clarke* has said, "The general rule which has obtained since *Noys* v. *Mordaunt*, is clear, that where a man does by will more than he has strictly a right to do, and gives a bounty to the person to whose prejudice that is done, the person prejudiced by one part shall not insist upon his right, and at the same time upon the bounty

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the legacy of 500*l.* by the said will, given to him, and that he is bound to account for the personal estate of the

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bounty by the will. The same thing was attempted in Lord *Somers*'s time, but did not prevail; as appears from *Lawrence* v. *Lawrence*," 2 *Ves.* 618. It seems, however, that the final decision in *Lawrence* v. *Lawrence* negatives not the existence of the general rule of election, but its application to the particular case, as not affording evidence of the testator's intention, that his widow should accept the devise in satisfaction of dower. That general rule was conclusively established by *Noys* v. *Mordaunt*, *February* 1706, 2 *Vern.* 581, *Gilb. Rep. in Eq.* 2, (described by Lord *Hardwicke*, 2 *Ves.* 14, 3 *Bro. P. C. ed. Toml.* 178, as the first case on the subject, a description of which the correctness has been justly questioned by Lord *Eldon*, 6 *Dowe*, 179.) The following are the principal cases (some in strictness, cases of express condition, or of satisfaction) in which the doctrine of election has been administered or discussed by courts of equity. *Boughton* v. *Boughton*, 2 *Ves.* 12. *Kitson* v. *Kitson*, *Pre. in Cha.* 351. *Streatfield* v. *Streatfield*, *Ca. Temp. Talb.* 176. *Forrester* v. *Cotton*, *Amb.* 388. 1 *Eden*, 532, a decision contradicted by later authorities. *Jenkins* v. *Jenkins*, *Belt*'s Supplement, 250. *Anon. Gilb. Rep. in Eq.* 15. *Cowper* v. *Scott*, 3 *P. W.* 119. *Cookes* v. *Hellier*, 2 *Ves.* 234. *Morris* v. *Burroughs*, 1 *Atk.* 399. *Kirkham* v. *Smith*, 1 *Ves.* 258. *Chetwynd* v. *Fleetwood*, 1 *Bro. P. C. ed. Toml.* 300, stated 2 *Schoales & Lefr.* 266. *Unett* v. *Wilkes*, *Amb.* 430. 2 *Eden*, 187. *Highway* v. *Banner*, 1 *Bro. C. C.* 584. *Lewis* v. *King*, 2 *Bro. C. C.* 600. *Hoare* v. *Barnes*, 3 *Bro. C. C.* 316. *Stratton* v. *Best*, 1 *Ves.*, jun. 285. *Finch* v. *Finch*, 4 *Bro. C. C.* 38. 1 *Ves.* jun. 534. *Bigland* v. *Huddleston*, 3 *Bro. C. C.* 285, n. *Blake* v *Bunbury*, 4 *Bro. C. C.* 21. 1 *Ves.* jun. 514. *Wilson* v. *Lord John Townshend*, 2 *Ves.* jun. 693. *Whistler* v. *Webster*, 2 *Ves.* jun. 367. *Wilson* v. *Mount*, 3 *Ves.* 191. *Blount* v. *Bestland*, 5 *Ves.* 515. *Rutter* v. *Maclean*, 4 *Ves.* 531. *Darlington* v. *Pulteney*, see the reference to this case *ante* p. 374. *Webb* v. *Lord Shaftesbury*, 7 *Ves.* 480. *Andrew* v. *Trinity Hall, Cambridge*, 9 *Ves.* 533. *Stewart* v. *Henry*, *Vern. & Scriv.* 49. *Moore* v. *Butler*, 2 *Schoales*

the said testatrix, without retaining the same; and His Honor doth order and decree, that the said Defendant Sir

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2 *Schoales & Lefr.* 249. *Birmingham* v. *Kirwan*, 2 *Schoales & Lefr.* 444. *Welby* v. *Welby*, 2 *Ves. & Beam.* 187. *Green* v. *Green*, 2 *Mer.* 86. *Tibbits* v. *Tibbits*, 2 *Mer.* 96, n. *Lord Rancliffe* v. *Parkyns*, 6 *Dowe* 149. And see *Ayres* v. *Willis*, 1 *Ves.* 230. *Robinson* v. *Hardcastle*, 2 *Bro. C. C.* 344. *Crosbie* v. *Murray*, 1 *Ves. jun.* 555. *Freke* v. *Lord Barrington*, 3 *Bro. C. C.* 274. *Rushout* v. *Rushout*, 6 *Bro. P. C. ed. Toml.* 89. 2 *Schoales & Lefr.* 267. *Sheddon* v. *Goodrich*, 8 *Ves.* 481. *Rich* v. *Cockell*, 9 *Ves.* 369. The remaining authorities, (with the exception of decisions on the question what testamentary benefit is an equitable bar of dower, collected in *Sanxter* v. *Foson*, *post.*), are cited in the notes to the present and the succeeding case.

The foundation of the equitable doctrine of election, is the intention, explicit or presumed, of the author of the instrument to which it is applied (*a*) and such is the import of the expressions by which it is described as proceeding, sometimes on a tacit (*b*), implied (*c*), or constructive (*d*) condition (*e*), sometimes on equity (*f*). From this principle the whole doctrine, with its distinctions and exceptions, is deduced.

The

(*a*) "There can never be a case of election, but upon a presumed intention of the testator." Lord Commissioner *Eyre*, 1 *Ves jun.* 557.

(*b*) *Ca. Temp. Talb.* 183. 15 *Ves.* 392, n.

(*c*) 2 *Vern.* 582. 10 *Ves.* 609. 616. 13 *Ves.* 220. 222. 3 *Bro. P. C. ed. Toml.* 177.

(*d*) 2 *Ves.* 14.

(*e*) 1 *Eden*, 536.

(*f*) 1 *Ves.* 306. 3 *Bro. P. C. ed. Toml.* 178. 2 *Atk.* 629. 3 *Atk.* 715. The term equity denotes the obligation affecting the conscience of the donee, to perform the intention of the donor, whose bounty he accepts, by fulfilling the condition of the gift; Lord *Rosslyn*, indeed, has on one occasion represented Lord Chief Justice *de Grey* to have referred the doctrine to a natural equity, as distinguished from an implied condition; (4 *Ves.* 538.) a distinction which, though apparently approved by a jurist of distinguished learning, (*Hargrave*, Juridical Arguments, v. ii. p. 302, 305,) is

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Sir *William Parker*, be let into possession of the said house and premises situated in *Salisbury* Court, in the pleadings

The intention of the author of the deed, (for it is established, that the doctrine of election extends to deeds. *Llewellyn* v. *Mackworth*, 3 *Barnard.* 445. *Freke* v. *Lord Barrington*, 3 *Bro. C. C.* 274. *Bigland* v. *Huddleston*, 3 *Bro. C. C.* 285. *n.* *Chetwynd* v. *Fleetwood*, 1 *Bro. P. C. ed. Toml.* 300. *Moore* v. *Butler*, 2 *Schoales & Lefr.* 249. *Birmingham* v. *Kirwan*, 2 *Schoales & Lefr.* 266. *Green* v. *Green*, 2 *Mer.* 86.), or will, to dispose of property which is not his, must be manifest, *Forrester* v. *Cotton*, *Amb.* 388. 1 *Eden* 532. *Judd* v. *Pratt*, 13 *Ves.* 168., 15 *Ves.* 390., *Dashwood* v. *Peyton*, 18 *Ves.* 27.; not conjectural, *Blake* v. *Bunbury*, 4 *Bro. C. C.* 21., 1 *Ves. jun.* 514., and see *Read* v. *Crop*, 1 *Bro. C. C.* 492. (*a*); and it is difficult to apply the doctrine of election, when the testator has some present interest in the estate disposed of, though not entirely his own, *Lord Rancliffe* v. *Parkyns*, 6 *Dowe* 185.

It has been decided, (in contradiction to the doctrine of *Stratton* v. *Best*, 1 *Ves. jun.* 285.), that for the purpose of determining the question, what property the testator intended to devise by general words, matter *dehors* the will may be received as evidence, that he considered the property of others as his own. *Finch* v. *Finch*, 4 *Bro.*

is for this purpose merely nominal, the equity supposing the condition; but it is clear from Lord *Alvanley*'s report of that judgment, (3 *Ves.* 530.) as well as from Lord *Rosslyn*'s statement at a former time, (2 *Ves.* 560.) that Lord Chief Justice *de Grey* meant to state the distinction, not between an implied condition and an equity, but between an express condition, and an equity arising from an implied condition.

(*a*) The following note of the judgment in that case, is extracted from Mr. *Cox*'s MSS.

"I think these words are too loose to raise the construction contended for. If he had devised all his estates generally, there would have been no doubt; and I cannot think that his mentioning his estates in the four places by name, is sufficient to make me suppose that he meant to devise his wife's estates. As to *Thorley* there can be no pretence for it, since he had an estate there to answer the description; and I think, therefore, that the wife is not called upon to make any election."

C. C.

pleadings mentioned, and any of the parties are to be at liberty to apply to this Court, as there shall be occasion. Reg. Lib. A. 1817, fol. 1893—1900. (*a*)

C. C. 38., 1 *Ves. jun.* 534. *Darlington* v. *Pulteney, ubi supra*, p. 374. *Rutter* v. *Maclean*, 4 *Ves.* 531. *Pole* v. *Lord Somers*, 6 *Ves.* 309. *Druce* v. *Dennison*, 6 *Ves.* 385., and see *Hinchcliffe* v. *Hinchcliffe*, 3 *Ves.* 516.; but it may be doubted, whether the authority of these decisions, the principle of which seems extremely questionable, will in future prevail. *Doe dem. Oxenden* v. *Chichester*, 4 *Dowe* 65. see p. 76. 89.

It seems, that mere recital of a supposed right in an individual named, will not amount to a gift of that right, or demonstration of an intention to give, so as to impose the obligation of election; *Dashwood* v. *Peyton*, 18 *Ves.* 27., see p. 41.; but the expression of a condition with reference to one individual, is not sufficient proof that there was no intention to raise a case of election in favor of another. *Id.* p. 39.

If a debtor, by his will, reciting the amount of the debt, directs payment of the sum at which he erroneously computes it, and also bequeaths a legacy to his creditor, the creditor may both claim the legacy, and dispute the calculation, the error in computation not denoting an intention to pay less than the actual debt. *Clark* v. *Guise*, 2 *Ves.* 617.

" If a man entitled to an estate not well devised from him by will, by the same will has a legacy given to him, with a power in the will to a trustee for him during his minority; it is paid to the trustee; but if he loses that legacy by failure of that trustee, and receives no satisfaction for it; I will never carry the rule in *Noys* v. *Mordaunt* to that extent, as to put him to make his election, merely because that trustee received that legacy for him during his minority." *Lord Hardwicke*, 2 *Ves.* 603.

Although a part of the benefits proposed by the will fails, the remainder may constitute a case of election; as on a devise of realty and bequest of personalty to the testator's widow, in bar of her claims under a settlement, the devise being void, the widow must elect between those

(*a*) See *Gretton* v. *Haward*, *post* p. 409.

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claims and the bequest; *Newman* v. *Newman*, 1 *Bro. C. C.* 186.; the testator not intending that any benefit under the will, should be enjoyed, unless all benefit under the settlement was relinquished. But a legatee declining one benefit charged with a burden, given to him by a will, is not bound to decline another benefit unconnected with a burden, given to him by the same will. *Andrews* v. *Trinity Hall*, 9 *Ves.* 534.

An absolute power in the testator, to dispose of the subject, and an intention to exercise that power, seem in general sufficient to raise a case of election; and therefore, (notwithstanding the doubt intimated in *Rich* v. *Cockell*, 9 *Ves.* 379.), a devise to the heir, although inoperative, (the heir, whether disputing or admitting the will, taking by descent), compels him to elect between the estate devised, and claims adverse to the will; *Noys* v *Mordaunt*, 2 *Vern.* 581., *Gilb. Rep. in. Eq.* 2., *Anon. Gilb. Rep. in Eq.* 15. *Welby* v. *Welby*, 2 *Ves. & Beam.* 187. *Thellusson* v. *Woodford*, 13 *Ves.* 224. The estate descending to the heir under his election to claim against the will, descends subject to the implied condition.

In the instance of wills, and probably of deeds of donation, the *effect* of election to take in opposition to the instrument, is not absolute forfeiture of the benefit proposed, but an obligation to indemnify the disappointed claimants, See *post* p. 433. Whether the same doctrine prevails in cases of express contract, (see 2 *Mer.* 95.) is a question yet undecided, the decision of which must, it seems, depend on distinct principles.

Election to take under a deed or will, imposes an obligation (to the extent at least of the benefit taken, 2 *Ves. jun.* 372.) to give effect to the whole instrument, by the relinquishment of every inconsistent right. On this principle, in *Morris* v. *Burroughs*, 2 *Atk.* 627., some children of a freeman of *London*, electing to abide by the custom, and others by their father's will, Lord *Hardwicke* declared, that the customary shares of the latter passed by the will. The title of the children to the orphan's portion, being paramount to the will, the condition of their claim under it, was, (by the ordinary rule,) that their property, of which it assumed to dispose, should be subjected to its disposition.

The rule of not claiming by one part of an instrument in contradiction to another, has *exceptions*, Lord *Hardwicke*,

wicke, 2 *Ves.* 33. and see *Vern. & Scriv.* 53.; and the ground of exception seems to be, a particular intention, denoted by the instrument, different from that general intention, the presumption of which is the foundation of the doctrine of election. "Several cases have been, and several more may be, in which a man by his will, shall give a child or other person, a legacy or portion in lieu or satisfaction of particular things expressed, which shall not exclude him from another benefit, though it may happen to be contrary to the will; for the Court will not construe it as meant, in lieu of every thing else, when he has said a particular thing." *Lord Hardwicke, East* v. *Cook,* 2 *Ves.* 33. Upon that principle it was decided in *Bor* v. *Bor*, 3 *Bro. P. C. ed. Toml.* 167. (see *Vern. & Scriv.* 53, 54.,) that the testator having by express proviso, made a disposition in the event of his not possessing power to devise certain estates, no implied condition arose against the heir, disappointing the devisee, but complying with the proviso. So a legatee, who cannot obtain a benefit designed for him by the will, except by contradicting some part of it, will not be precluded by such contradiction, from claiming other benefits under it. *Huggings* v. *Alexander*, cited 2 *Ves.* 31. The intention being equal in favor of each part of the testamentary disposition, no reason is afforded for controling one, in order to accomplish the other. Under a will containing a bequest to the testator's widow, in satisfaction of all dower or thirds which she might claim out of his real or personal estate, or either of them, and a residuary bequest which failed, the widow, accepting the specific bequest, was not excluded from her distributive share of the undisposed residue. For if the Court could, (which it cannot), on a question between the next of kin, advert to the will, it would find there no evidence of an intention to exclude the widow in their favor. *Pickering* v. *Lord Stamford*, 3 *Ves. jun.* 332. 492.

But although a particular benefit is given expressly in satisfaction of a particular claim, yet, if the assertion of that claim appears inconsistent with the intention of the testator, the claimant must relinquish all his rights under the will. *Graves* v. *Boyle*, 1 *Atk.* 509. *Jenkins* v. *Jenkins, Belt's Supplement*, p. 250.

A devise of freehold by a will not executed conformably to the statute of frauds, will not impose the obligation of election on the heir disputing its validity, and at the same time

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claiming benefits under other clauses of the will. *Hearle* v. *Greenbank*, 3 *Atk.* 715., 1 *Ves.* 306, 307. *Carey* v. *Askew*, 8 *Ves.* 492. 496., 1 *Cox* 241. *Goodrich* v. *Sheddon*, 8 *Ves.* 481. *Thellusson* v. *Woodford*, 13 *Ves.* 209. A devise by an infant, is equally ineffectual for this purpose. *Hearle* v. *Greenbank*, 3 *Atk.* 695. 1 *Ves.* 298., 13 *Ves.* 223. These instances seem not so much exceptions to the rule, (though commonly so described), as cases not including the fact which the application of the rule assumes. They were decided on the principle, that the devise being void for all purposes, the Court cannot advert to it as evidence of the testator's intention; the will must be read as if that clause were expunged, and it then contains nothing to raise the question of election. Upon the same principle, the Court refused to read, for the purpose of compelling the husband to elect, a bequest of a diamond ring, in the will of a married woman, which the ecclesiastical court had adjudged to affect her separate estate only. *Rich* v. *Cockell*, 9 *Ves.* 381. But if the will affords valid evidence of the testator's intention, as by a condition annexed to a personal legacy to the heir, not to dispute the will, which not being duly executed, contained a devise to a stranger, it is settled, (though the propriety of the distinction has been much questioned, by Lord *Kenyon*, 1 *Cox* 244., by Lord *Eldon*, 8 *Ves.* 497., by Lord *Erskine*, *Sugd. on Powers*, 380. *n.*, and by Sir *William Grant*, 2 *Ves.* & *Bea.* 130.) that the heir must elect between the inheritance and the legacy. *Boughton* v. *Boughton*, 2 *Ves.* 12. He cannot take the legacy, without complying with the express condition. *Whistler* v. *Webster*, 2 *Ves. jun.* 371. *Carey* v. *Askew*, 8 *Ves.* 492. 496., 1 *Cox* 241. *Sheddon* v. *Goodrich*, 8 *Ves.* 481.

Before the recent statute 55 *G.* 3. *c.* 192., giving validity to wills of copyhold without surrender, it had been decided that a specific devise of unsurrendered copyhold, (not a general residuary devise, *Judd* v. *Pratt*, 13 *Ves.* 168., 15 *Ves.* 390.) compelled the heir, taking other benefits under the will, to elect; *Allen* v. *Poulton*, 1 *Ves.* 121. *Goodwyn* v. *Goodwyn*, 1 *Ves.* 226. *Ardesoife* v. *Bennet*, 2 *Dick.* 463. *Frank* v. *Standish*, 1 *Bro. C. C* .588 *n.*, 15 *Ves.* 391. *n.* *Unct* v. *Wilkes*, *Amb.* 430., 2 *Eden*, 187. *Rumbold* v. *Rumbold*, 3 *Ves.* 65. *Pettiward* v. *Prescott*, 7 *Ves.* 541., and see *Wilson* v. *Mount*, 3 *Ves.* 191.;

7 the

the Court not holding itself precluded, from adverting to the devise, (though otherwise ineffectual) as evidence of intention. In like manner, an heir entitled to benefits under a will directing conveyances of future purchases, on trusts specified, must give effect to that direction; *Thellusson* v. *Woodford*, 13 *Ves.* 209., 1 *Dowe* 249.*; and an heir of heritable property in *Scotland*, taking a personal legacy under the will of his ancestor domiciled in *England*, which contained a general devise, void by the law of *Scotland*, was compelled to elect. *Brodie* v. *Barry*, 2 *Ves. & Bea.* 127.

It has been decided, that the heir is not put to election by a devise under an erroneous supposition of title. *Cull* v. *Showell*, *Amb.* 727. 3 *Wooddeson Lect. App.* 1. The decision in that case, may probably be vindicated on the ground of lapse of time; but the general principle, though apparently approved by Lord *Redesdale*, 2 *Schoales and Lefr.* 267. has been satisfactorily overruled, *Whistler* v. *Webster*, 2 *Ves.* 370, 371. *Thellusson* v. *Woodford*, 13 *Ves.* 221. *Welby* v. *Welby*, 2 *Ves. & Bea.* 199., and see *Walpole* v. *Lord Conway*, 3 *Barnard* 153., 2 *Ves. jun.* 707., in consideration of the absence of proof, that the testator's intention would have been changed by a knowledge of the true title, and the uncertainty introduced by conjectural inquiry on that subject.

Lord *Hardwicke* appears, on one occasion, to have entertained an opinion, that the doctrine of election is not applicable to interests in remainder after an estate tail, *Bor* v. *Bor*, 3 *Bro. P. C. ed. Toml.* 178. *n.*; and the Court of Exchequer in *Ireland*, deliberately adopted that conclusion, *Stewart* v. *Henry*, *Vern. & Scriv.* 49., on the ground that "in cases of wills, things are to be taken as they stood at the testator's death;" and that if at that time the remainder-man had been directed to confirm the devise, as far as he could, by levying a fine, in order to bar his issue, the tenant in tail might the next moment, have barred all the remainder-men, and such a decree therefore, would have given no substantial benefit. The principle of this exception seems extremely questionable; the doctrine of election is applied to interests, in respect, not of their amount, but of their inconsistency with the testator's intention; and to assume their remoteness, or their value, as a criterion of the existence or the absence of that intention, would introduce that

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uncertainty which on questions of property, is perhaps the worst defect of law. Accordingly, the doctrine of election has been declared to be applicable to "interests immediate, remote, contingent, of value, or not of value." 2 *Ves. jun.* 697., and in *Graves* v. *Forman, cit.* 3 *Ves.* 67, Lord *Hardwicke* seems to have applied it to an estate for life in remainder after estates tail; and see *Highway* v. *Banner*, 1 *Bro. C. C.* 584.

The opinion of Lord *Northington*, that the rule of election, "must be confined to plain and simple devises of the inheritance, and cannot be extended to limitations." *Forrester* v. *Cotton, Amb.* 388., 1 *Eden.* 532. is not sanctioned by subsequent authorities.

It has been decided, that an appointment by will, under a power to appoint among children, being valid to a certain extent, and void for the remainder, a child to whom a part is well appointed, is not excluded from his proportion of the shares of which the appointment fails; the doctrine of election founded on compensation, not being applicable to a case in which the testator had given no free disposable property. *Bristow* v. *Warde*, 2 *Ves. jun.* 336.

Nor is that doctrine applicable against creditors taking the benefit of a devise for payment of debts, and also enforcing their legal claim upon other funds disposed of by the will, *Kidney* v. *Coussmaker*, 12 *Ves.* 136., (an exception founded on the distinction between creditors, as claimants for a valuable consideration, and devisees and legatees as volunteers); nor against a creditor, who, in the character of heir, has disputed the validity of a devise for payment of debts, *Deg* v. *Deg*, 2 *P. Wms.* 418.; nor in favour of a residuary legatee, "if a particular demand of any one taking a benefit under the will, subjects the personal estate to a debt," 3 *Ves.* 385., 2 *Ves. jun.* 561.; a claim to the residue supposing the previous satisfaction of debts.

A devisee claiming by the will, is not precluded from enjoying a derivative interest, to which he is entitled at law, under a legal estate taken in opposition to the will; thus, a husband may be tenant by the curtesy of an estate tail, held by his wife against a will, under which he accepted benefits, *Lady Cavan* v. *Pulteney*, 2 *Ves. jun.* 544., 3 *Ves.* 384.; the estate taken in opposition to the will, vesting with all its legal incidents. Nor will the election of the heir, a married woman, between real estates the subject of a void devise,

3 and

and a legacy to her separate use, affect the marital rights of the husband, deriving no benefit from the will. *Brodie* v. *Barry*, 2 *Ves. & Bea.* 127.

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By the will of *S.*, *A.* his widow took a life interest, and his six children the remainder in fee as tenants in common, in his real estates, of the annual value of 870*l.*; *A.*, under the erroneous expectation of acquiring an absolute power of disposition, having levied a fine of her husband's estates, devised a portion of them, worth about 135*l.* *per annum*, to *G.* her grandson in fee; another portion of like amount, (together with an estate of her own at *N.*, of the annual value of 115*l.*) for the benefit of the widow and children of *W.* her eldest son; and the residue, worth about 600*l.* *per annum*, to her daughter *E* in fee: *W.* being entitled, under the will of *S.*, as one of his children, to one-sixth, and as heir to three of his brothers who died without issue, to three-sixths, of his father's estates, devised all his real estate for the benefit of his widow and children, and died shortly before his mother *A.*: the widow and children of *W.* electing to take under the will of *S.*, and in opposition to that of *A.*, and by that election frustrating, to the extent of 455*l.* *per annum*, the disposition of the latter in favour of *E.*, *E.* is entitled to the estate at *N.* in partial compensation.

BY his will dated the 18th of *June* 1747, *Serle Edward Haward*, being seised of certain estates at *Charing Cross* and in *Saint Martin's*, subject to a mortgage in fee, devised and bequeathed all his real and personal estate to his wife *Ann Haward*, (she first paying his just debts and funeral expenses), and after her decease, to the heirs of her body share and share alike, if more than one; and, in default of issue to be lawfully begotten by the testator, to be at her own disposal; and he appointed his wife sole executrix and residuary legatee.

The testator died in 1766, leaving *Ann Haward* his widow, and *Edward Haward*, *Ann Haward*, (afterwards *Ann Gardner*,) *Elizabeth*, *William*, *Francis*, and *James*, *Haward*, his six surviving children by her, of whom *Edward*, *Francis*, and *James* died intestate and without issue, leaving *William* their heir.

(*a*) This case, of recent date, is introduced here in consequence of its connection with the doctrine discussed in the preceding.

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Ann Haward, the testator's widow, entered into possesson of his estates, and being advised that under his will she took an estate tail, and that, the remainder in fee being in herself, she might, by levying a fine, acquire the power of disposing of the estates devised to her, on the 8th of *September* 1807, executed a deed, covenanting to levy a fine, (which was afterwards levied,) and declaring, that it should enure to such uses as she should by deed or will appoint.

By her will dated the 7th of *August* 1809, *Ann Haward* devised three messuages, (part of her husband's estates,) as to one moiety, to her grandson *George Gardner* in fee, and as to the remaining moiety, to *B. Page*, *W. Watson*, and *R. L. Appleyard*, their heirs and assigns, in trust to sell and stand possessed of the purchase money, in trust for *Jane Haward*, the widow of the testatrix's late son *William Haward*, and for such of the children of *William Haward* living at the testatrix's decease, as being sons should attain twenty-one, or being daughters should attain that age or be married, equally to be divided between *Jane Haward* and such children; with remainder, in case of all dying before their shares vested, to *George Gardner*, his executors, &c.; and the residue of her late husband's estates she devised to her daughter *Elizabeth Haward* in fee. The testatrix then devised to *Page*, *Watson*, and *Appleyard*, an estate at *Nine Elms* in the county of *Surry*, to which she was entitled in her own right, upon trust, till each of the children of her late son *William Haward*, living at her decease, should attain the age of twenty-one years or die under that age, to permit *Jane Haward* to enjoy it, (if she should so long continue unmarried,) to the intent that the produce might be applied by her towards the maintenance of herself and the child or children of *William Haward*, and upon farther trust, as soon as each

of

of the children of *William Haward*, living at the testatrix's decease, should attain the age of twenty-one years or die under that age, to sell the premises and stand possessed of the purchase money upon such trusts, for the benefit of *Jane Haward* and the children of *William Haward*, as before expressed concerning the money to arise from the sale of the moiety of the three messuages devised to them; but in case no child of *William Haward* should live to attain a vested interest, upon trust for *Elizabeth Haward*, her executors, &c. The testatrix devised and bequeathed to *Elizabeth Haward* the residue of her real and personal estate, and appointed her executrix.

Ann Haward died in *February* 1810, leaving *William Haward* the younger her grandson and heir, (heir also of his father the late *W. Haward*, and of his grandfather the testator *Serle Edward Haward*,) and the remaining children of the late *W. Haward* and *George Gardner*, her grandchildren, and *Elizabeth Haward* her only child.

William Haward, who died shortly before his mother *Ann Haward*, by his will, dated the 27th of *December* 1808, devised all his real estates to *Henry Gretton* and *Isaac Andrews* in fee, upon trust to sell and stand possessed of the purchase money, and also of his personal estate in trust, as to one-seventh, for his wife *Jane Haward*, her executors, &c., and as to the remaining six-sevenths, for all his children, living at his decease or born in due time afterwards, in equal shares, with benefit of survivorship between them, in case any should die under the age of twenty-one years, with remainder, in case of the death of all such children, for *Jane Haward*, her executors, &c. He appointed his wife, and *Gretton* and *Andrews*, executrix and executors, and declared

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clared that the provision made for her, was intended in full satisfaction of her dower or thirds.

William Haward died in *May* 1809, leaving *W. Haward* the younger his eldest son and heir, and *Jane Haward* his widow, and five younger children.

In 1811, the trustees named in the will of *W. Haward*, and his widow and younger children, instituted the present suit against *Elizabeth Haward* the surviving daughter of *Serle Edward Haward*, *George Gardner* one of his grandsons, *William* the eldest son and heir of *William Haward* deceased, the trustees named in the will of *Ann Haward*, and the mortgagees; insisting that under the will of *Serle Edward Haward*, his widow *Ann Haward* took only an estate for life, and that *Willliam Haward*, as his heir, was entitled to the reversion in the devised estates, subject to the life interests of the widow and of the other children, or if the children took estates in fee simple, then, that *W. Haward* was entitled to one-sixth of the devised estates in his own right, and to three-sixths as heir of the three children of *Serle Edward Haward* who died without issue.

The bill prayed that the will of *William Haward* might be established, and the trusts carried into execution; that the will of *Serle Edward Haward* might be established, and the interests taken thereunder by the late *Ann Haward* and *William Haward* declared; and that such part of the premises as passed to *William Haward* under the will of *Serle Edward Haward*, or as his heir, or as the heir of his other children deceased, might be sold, and one-seventh of the produce paid to *Jane Haward*, and the remaining six-sevenths to the trustees named in the will of *William Haward*, in trust for his children.

At

At the hearing of the cause on the 5th of *July* 1813, the Master of the Rolls directed a case for the opinion of the Judges of the Court of Common Pleas, who certified, that under the will of *Serle Edward Haward*, his widow *Ann Haward* took an estate for life only in the devised premises; and each of her six children a fee simple in remainder expectant upon the mother's life estate, in one undivided sixth-part of the premises, as tenant in common with the other five children. (*a*)

By the decree on the 29th of *July* 1816, the rights of the parties were declared conformably to this certificate (*b*); and it was farther declared, that *William Haward*, at the time of making his will, and of his death, was as one of the six children, of *Serle Edward Haward*, seised of the reversion of one-sixth part of his estates, and of the reversion of three other sixth-parts thereof, as the only surviving brother and heir of *Edward, Francis,* and *James, Haward*; that *Elizabeth Haward* was, as one of such six children, seised in her own right of one other sixth-part, and *George Gardner*, as the only child and heir of *Ann Gardner* (formerly *Ann Haward*) deceased, of the remaining sixth-part; the decree also declared, that the children of *William Haward* must elect whether they would take under or against the will of *Ann Haward*; and *James Haward*, and *Edward Haward* being infants, it was referred to the Master to inquire whether it would be for their benefit to take under or against the will. (*c*)

Infants being bound to elect to take under or against a will, reference to the Master to inquire which was for their benefit.

(*a*) 6 *Taunt.* 94. (*b*) 1 *Mer.* 448.

Under

(*c*) Some variety of practice appears to have prevailed, in the event of disability (by minority or coverture) of the person bound to elect. On a devise to a younger son, by a will not duly attested, containing a contingent legacy

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Under this decree, the adult children of *William Haward*, having elected to take against the will of *Ann*

gacy to the heir, with express condition of forfeiture if she controverted the will, the heir being an infant, Lord *Hardwicke* held "that she could not judge for herself, nor could the Master judge for her, it being on several contingencies, so that, until she came of age, no election could be made;" and he directed the devisee (being restrained from committing waste) to receive the rents of the devised estates, subject to farther order. *Boughton* v. *Boughton*, 2 *Ves.* 12. (a) According to *Vernon*'s report, a like course was pursued in *Thomas* v. *Gyles*, 2 *Vern.* 232., but from the Register it appears, that in that case, the rights of the parties were founded, not so much in the doctrine of election, as in express contract between the testatrix and the ancestor of the infant heir. In *Bor* v. *Bor*, 3 *Bro. P. C. ed Toml.* 173, final election by the heir was suspended during minority, with provisional election by his guardian in the interval; the Lord Chancellor of *Ireland* having decreed, that the infant should have six months after he attained the age of twenty-one years to elect, and should, in the mean time, receive the rents of the devised or descended estates at the election of his guardian, without prejudice, and subject to the order of the Court. In *Chetwynd* v. *Fleetwood*, 1 *Bro. P. C. ed. Toml.* 300., 2 *Schoales & Lefr.* 266, an infant heir being under an obligation to elect, either to provide for the payment of a sum which his ancestor had covenanted to pay, or to convey estates which, in consideration of that payment, had been settled on him, Lord *Talbot* C. directed an inquiry which would be most beneficial to the infant, and on the Master's report decreed payment of the sum; and his decree was affirmed by the House of Lords. A like practice seems to

have

(a) The propriety of this order has been questioned, not without plausibility, *Bell*'s Supplement, p. 248.; possibly it proceeded on the notion that the disposition of the will should not be disturbed except by actual election to take against it, and that any inconvenience consequent on the suspense of election, ought to affect the individual by whose disability it was occasioned. See 2 *Ves. jun.* 697.

Ann Haward, and the Master having reported that the like election would be for the benefit of the infant; a petition

have been adopted in *Goodwyn* v. *Goodwyn*, 1 *Ves.* 228., but in *Streatfield* v. *Streatfield*, *Ca. Temp. Talb.* 176, the same judge postponed election, on the ground of the inability of the heir to elect during minority, (see the decree *post* p. 447. (C)); and in *Hervey* v. *Desbouverie*, *Ca. Temp. Talb.* 130. reserved the election of an infant daughter of a freeman of *London* to take by the will or the custom, until twenty-one or marriage.

In *Rushout* v. *Rushout*, 6 *Bro. P. C. ed Toml.* 89, an infant being bound to elect between different sums (one payable at eighteen or marriage, and the other at twenty-one or marriage), charged on distinct funds, Lord *Cowper* C. decreed that she should make her election at the age of eighteen; she accordingly at that age (by a written instrument) elected to take the latter sum, and the decree was affirmed by the House of Lords. Lord *Redesdale* has stated, that, in this case, " it was considered that the Court was bound to see what was for the benefit of the infant, and make election for her, for otherwise other persons might be injured for want of that election," 2 *Schoales & Lefr.* 267. It seems difficult to reconcile this statement with the printed report, according to which the infant was ordered to elect, and actually elected, and the election was suspended during five years, the decree to elect having been pronounced in 1716, and the election made in 1721. In *Bigland* v. *Huddlestone*, 3 *Bro. C. C.* 285, n. the Master was directed to inquire whether it would be for the benefit of the infant heir to take under or against the settlement.

In the instance of disability by coverture, Lord *Hardwicke* held, that a married daughter of a freeman of the city of *London* could not declare her election to take her share of her father's personal estate, under his will or by the custom, without appearing either in Court, or, if resident abroad, before persons named as commissioners; *Parsons* v. *Dunne*, 2 *Ves.* 60, *Belt*'s Supplement, 276.; and a case was on that occasion cited, in which the husband and wife attending in court,

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petition was presented by *Elizabeth Haward*, stating, in addition to the preceding facts, that the estates of *Serle Edward Haward*, were let at rents forming a total of 870*l. per annum*, of which the portion devised by *Ann*

court, and differing in election, "*Verney*, Master of the Rolls, referred it to a Master, to see what was most for her benefit." 2 *Ves.* 61. See 2 *Ves. jun.* 560., 4 *Ves.* 626.

In *Ardesoife* v. *Bennet*, 2 *Dick.* 463, the receipt during five years, by a married woman, of interest on a legacy bequeathed to her separate use, and manifestly more valuable than the estate to which she had an alternative title, was held to constitute an election conclusive on her heir.

In *Pulteney* v. *Darlington*, Mrs. *Pulteney* was ordered, within a limited time, to signify her election to take under the will of Sir *William Pulteney*, or under the will of General *Pulteney*, by signing the Registrar's book by her clerk in court; and the time having expired, the Master was directed to inquire which claim was preferable, and election was made in conformity to his report. 7 *Bro. P. C. ed. Toml.* 546, 547., 3 *Ves.* 385., 2 *Ves. jun.* 560.

Lord *Rosslyn*, in *Wilson* v. *Lord John Townshend*, 2 *Ves. jun.* 693, alluded to various orders in the instance of *femmes covertes* bound to elect, directing an inquiry by the Master, which fund would be most beneficial; but the comparative value of the funds appearing there on the pleadings, he decided the question, and dismissed the bill without a reference. In *Vane* v. *Lord Dungannon*, Lady *Charlotte Kerr*, a *femme coverte*, was directed to make her election before the Master within six months. 2 *Schoales & Lefr.* 133.

Lord *Eldon* seems incidentally to admit the practice of directing an inquiry by the Master as established in the instance of coverture, *Davis* v. *Page*, 9 *Ves.* 350.; and it is understood as established in the instance of minority also; (see *ante* p. 413. & 2 *Fonbl.* Treat. on Equity, 326, n.), though possibly it would not be unreasonable, in the latter instance at least, considering that preference may be determined by circumstances independent on pecuniary value, to distinguish between cases where the interests of third persons require an immediate, and where they admit a suspended, election.

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Haward to the petitioner, amounted to 600*l.*, the remainder being by her devised in moieties, (of 135*l.* each,) one to *George Gardner*, the other, for the benefit of *Jane Haward* and her children by *William Haward*, to whom the testatrix had also devised her own estate at *Nine Elms*, of the annual value of 115*l.*, and who therefore, under her disposition, would take to the amount of 250*l.* only; that by the decree, the petitioner and *George Gardner*, take each, one-sixth of *Serle Edward Haward's* estates, amounting to 145*l. per annum*, and *Jane Haward* and her children take the remaining four-sixth parts, amounting to 580*l. per annum*, by which distribution, *Gardner* derives a benefit of 10*l. per annum*, and *Jane Haward* and her children, (independently on the *Nine Elms* estate intended for them), of 445*l. per annum*, while the petitioner sustains a loss of 455*l. per annum*. The petition prayed, that the petitioner might be declared entitled to the estate at *Nine Elms*, devised by *Ann Haward*, for the benefit of *Jane Haward* and her children, by way of compensation, as far as it would extend, for the loss sustained by the petitioner of the estates devised to her by *Ann Haward*, which *Jane Haward* and her children have elected to take against the will of *Ann Haward*; and that in taking the accounts directed by the decree, of the rents of *Serle Edward Haward's* estates, the Master might allow to the petitioner a proper sum, in compensation for the rent of the estate at *Nine Elms*, from the death of *Ann Haward*, till the petitioner should be let into possession, to be paid from the share of *Serle Edward Haward's* estates, to which *Jane Haward* and her children should be found entitled.

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The petition having, on the last petition day, been ordered to stand over for argument, was this day argued.

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Mr. *Horne* and Mr. *Shadwell* for the petition.

No case is to be found in all circumstances precisely similar to the present, but the petition proceeds on the general principle, that where one devisee, by electing to take against the will, frustrates the testator's intention in favor of another, the benefit designed for the former shall be applied in satisfaction of the latter. *Streatfield* v. *Streatfield.* (a) The petitioner being, by the election of the widow and children of *William Haward* to assert their prior rights under the will of the grandfather, against the will of *Ann Haward*, excluded from the estate devised to her by the testatrix, is entitled to be indemnified *pro tanto* from the *Nine Elms* estate destined for them. The plaintiffs, seeking the aid of a court of equity, must submit to its rules, and cannot compel an inequitable distribution. The situation of the heir is, for this purpose, not distinguishable from that of the other children of *William Haward*. In the case cited, the Court applied the doctrine against the heir claiming adversely, though in that character, by descent; here the heir appears in the character of devisee, electing to take under the will of his grandfather; the rule, therefore, that no one shall claim at once under and against a will, is personally applicable to him.

Mr. *Wray*, for *William Haward*, the heir of his father, of *Ann Haward*, and of *Serle Edward Haward*.

I admit that where the ancestor devises to his heir an estate of which he has power to dispose of, and to a third person another estate settled on the heir, and the heir asserts his rights under the settlement, he shall not retain the estate given to him by the will. Here the estate which the petitioner claims was devised for the benefit, not of the heir alone, but of the widow and all the

(a) *Ca. Temp. Talb.* 176.

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children of his father; and it is by the joint election of those persons, not the single election of the heir, that the intention of the testatrix in favor of the petitioner is frustrated. The doctrine of compensation has been applied in bequests of personalty, or devises disappointed by the election of the heir, but it has never been extended against the heir in the instance of devises disappointed by the election of others. The devisees electing to claim against the will, the estate designed for them becomes, in the event, undisposed of, and belongs therefore to the heir; upon what principle can the Court take from him, for the benefit of the petitioner, the shares of that estate which those devisees have by their election abandoned? Admitting that his own share is within the doctrine supposed, no case has decided that he is not entitled to retain the shares which, by reason of the election of others, devolve to him as undisposed of. The devise on trust cannot affect the question; the estate in the trustees is neutral, and the point must be determined as if the legal estate had descended to the heir.

Another question is, whether the Court will interfere in the instance of partial disappointment? A course which would involve great difficulties of calculation. The analogous practice under the statute of distribution, (the practice of bringing into hotchpot sums advanced during the life of the intestate), has never been extended to instances of partial intestacy, where by a will affecting only a portion of the property, benefits are given to some of the children; the Court being unable to ascertain whether either the particular intention of the party, or the equity of the case, would be accomplished by such an arrangement, and declining to encounter the intricacy of calculation.

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A third peculiarity of this case, and a distinct objection to this petition, is, that the petitioner herself, in effect, takes against the will of her mother; her interest in the estates of *Serle Edward Haward*, devolves on her as his devisee; a character inconsistent with that in which she claims compensation.

Mr *G. Wilson*, for the Plaintiffs, insisted, that if the petitioner was entitled to the estate at *Nine Elms*, allowance must be made for sums expended by the Plaintiffs in its improvement.

The MASTER *of the* ROLLS.

The object in directing this petition to stand over for argument was to discuss, not the general doctrine of election, but the peculiarities of the case, and the question, on which few authorities occur, what disposition is to be made of the estate relinquished by a party who elects to take against the will? The principle of election is clear, not merely as an abstract theory, but as pursued to practical consequences. When a party elects to abide by the will, the practical consequence is, that he must relinquish his own estate, of which the will purports to dispose; and the Court has in some instances directed him to execute a conveyance, in conformity to the intention of the testator, not leaving the estate to pass by the will, which would give to the devisee only an imperfect title. The doctrine is so stated by Lord Commissioner *Eyre*, in *Blake* v. *Bunbury* (*a*), (concurring with many other cases,) and there the plaintffi, electing to claim "under the will, was decreed to convey the rent charge to the uses of the will." (*b*) The Court imposes an implied condition, that if the party accepts the estate, which the testator had power to give, he shall convey his own, over which the testator had no power, to the individual to whom it

(*a*) 1 *Ves. jun.* 523. (*b*) *Id.* 527.

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is actually, but ineffectually, devised. If he refuses to abide by that condition, and preferring his own, rejects the estate offered to him on the terms under which, if at all, he must take it, renouncing the will, it is a practical consequence that he is not permitted to retain, but must relinquish, the benefits which it purports to confer on him. So far is clear; not as an abstract proposition, but as a practical contrivance. In most instances, the party has elected to abide by the will, and then no difficulty occurs. This case presents further peculiarities, in addition to the circumstance of election to take against the will. If, however, a clear rule is established, no theoretical objection can be suffered to interfere with it; if no rule exists, the Court must on principle consider what is to be done in a new case. Being reluctant to innovate, more especially in a question of real property, I was desirous to ascertain whether it had not been settled by decision, that, in the event of election to reject the will, the estate relinquished by that election, shall be taken from the heir at law, and given to the disappointed devisee.

Noys v. *Mordaunt*, determined in 1706, is said to be the first case on the subject of election; and a great authority, Chief Baron *Eyre* (*a*) has described this practice of putting devisees to election, however reasonable, as a strong operation of a court of equity. I cannot say that I am at all satisfied that the mere circumstance of peculiarity in this case, that the heir at law is one of the individuals who have made election, ought to distinguish it. Though a party must be taken to have elected, still if a new right arises, not adverted to at the time, as no one is ever compelled to elect till the whole subject matter has been ascertained, and he knows all

(*a*) 4 *Bro. C. C.* 24. 1 *Ves. jun.* 523.

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his rights on each side, the Court would, according to its habit, indulge him with farther opportunity to be informed of his interests. It is to be considered also, that the heir is bound to elect, and has made election, not in the character of heir, but between two instruments in neither of which is that character concerned; he is required to declare whether he will abide by the will of *Serle Edward*, or by the will of *Ann*; of these he prefers the former, but that choice has no connection with his claim as heir. When the heir asserts his paramount title, no court is authorised *a priori* to impose any condition on him. Insisting on his right before the will was made, and declining to accept any benefit under it, what authority has this Court to annex a qualification? To deprive him of a title prior to any will? I think, therefore, that neither of these points is conclusive; but the fair way of considering the question, and the true test, is this; supposing the heir not interested in either instrument, nor having made any election, to advance a claim to this *hæreditas jacens*, alleging that the estate not being accepted by the person for whom the testator destined it, is in effect given to no one, and therefore (as a devise lapsed by the death of the devisee in the life of the testator) devolves to him in his character of heir; supposing him thus neither affected by any antecedent acts, nor interested in the property under an instrument varied by the wills of his father or grandmother, how would the Court deal with his claim? On general principles, it might be said, that the estate not being in the event effectually given, the devisee (who cannot be permitted to enjoy a double benefit, both the property devised to him, and property the title to which is inconsistent with the will), must indeed relinquish it, but that what is then to be done with it, is a quite different question. The doubt is, does it pass to the heir, as, in the actual event, undisposed

disposed of, the will being frustrated; or come into the hands of the Court, under an authority to apply it for the benefit of the person who has been disappointed? If that authority has been constantly exercised, however disputable in its nature, it cannot now be impeached.

Few cases are to be found on the subject, but it must be acknowledged that the language of the great judges by whom it has been discussed, proceeds to the extent of ascribing to the Court an equity to lay hold on the estate thus taken from the devisee by the principle of election, and dispose of it in favour of those whom he has disappointed; not merely taking it from one, but, such is the uniform doctrine, bestowing it on the other. A doctrine not confined to instances in which the heir is put to election, and which may be said to bring him within the operation of the general principle, but prevailing as an universal rule of equity, by which the Court interferes to supply the defect arising from the circumstance of a double devise, and the election of the party to renounce the estate effectually devised; and instead of permitting that estate to fall into the channel of descent, or to devolve in any other way, lays hold of it, to use the expression of the authorities, for the purpose of making satisfaction to the disappointed devisee: a very singular office; for in ordinary cases, where a legatee or devisee is disappointed, the Court cannot give relief; but here it interposes to assist the party whose claim is frustrated by election. Such is the language of Lord Chief Justice *de Grey*, cited with approbation by Lord *Loughborough*; "the equity of this Court is to sequester the devised estate *quousque* till satisfaction is made to the disappointed devisee." (*a*) I conceive it to be the universal doctrine that the Court possesses

(*a*) Lady *Cavan* v. *Pulteney*, 2 *Ves. jun.* 560.

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power to sequester the estate till satisfaction has been made, not permitting it to devolve in the customary course; out of that sequestered estate so much is taken as is requisite to indemnify the disappointed devisee; if insufficient, it is left in his hands. In the case to which I have referred, Lord *Loughborough* uses the expression, that the Court "lays hold of what is devised, and makes compensation out of that to the disappointed party."

A distinction has been attempted between real and personal property: I cannot see a principle on which the Court could think itself at liberty to sequester and distribute personalty, in the event not given to the individual intended, that would not apply equally to realty; the object being to direct the devolution of the property in a course prescribed by equity. Undoubtedly in the instance of personalty, satisfaction has been repeatedly given. In a case not reported (the name of one of the parties I recollect was *Brodie*) the property being divided into eleven parts, the Court followed it, for the purpose of satisfaction; and in several cases, anticipating either contingency, the decree has provided for the event of election to take against the will, by a direction for making compensation out of the estate. It would be too much now to dispute this principle, established more than a century, merely on the ground of difficulty in reducing it to practice, and disposing of the estate taken from the heir at law without any will to guide it; for to this purpose there is no will; the will destined to the devisee, not this estate but another: he takes by the act of the Court; (an act truly described as a strong operation;) not by descent, not by devise, but by decree; a creature of equity.

If this doctrine were now advanced for the first time, some objections might seem to occur to it. The disappointment

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appointment of the devisee not arising from any wrong done to him, or any right withheld from him, but resting in the loss of a gift, from a want of title in the testator to dispose of what is given, how does it afford any claim to compensation in a court of justice? The testator might have anticipated and provided for this event, and have, in such case, substituted one estate for the other; and, perhaps, if he were now living, this is what he might wish to do; but not having expressed any such intention in his will, how can the Court supply the omission, and make a new will for him, giving one estate not devised, in lieu of the estate which was? In what way too is this to be effectuated, so as to invest this disappointed devisee with a clear and indefeasible title in the estate thus given him by the Court? Did the estate pass under the devise or did it not? If in consequence of the election and the noncompliance with the implied condition, the devisee is precluded from taking the estate, and no other disposition of it is made by the will, must it not devolve on the heir at law as being in event undisposed of; and if so, what equity is there against the heir, supposing him no party to the election, to restrain him from recovering in ejectment; or if not restrained, how is any defence to be made against his claim under the devise, which the devisee is precluded, by his election, from availing himself of, as well in law, according to Lord *Redesdale* (*a*), as in equity? How too is

(*a*) "The rule of election, I take to be a rule of law, as well as of equity; and the principal reason why courts of equity are more frequently called upon to consider the subject (particularly as to wills) than courts of law, I apprehend is, that at law, in consequence of the forms of proceeding, the party cannot be put to elect; for in order to enable a Court of law to apply the principle, the party must either be deemed concluded, being bound by the nature of the instrument, or must have acted upon it in such a manner, as to

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is the devisee ever to obtain the legal estate, or to perfect his title without a conveyance from the heir at law?

to be deemed concluded by what he has done; that is, to have elected. This frequently throws the jurisdiction into equity, which can compel the party to make an election, and not leave it uncertain under what title he may take." 2 *Schoales & Lefr.* 450.

Lord *Rosslyn*, also is reported to have said, "The principle of these cases," (cases of election) "is very clear. The application is more frequent here; but it is recognized in courts of law every day. You cannot act, you cannot come forth to a court of justice, claiming in repugnant rights." 2 *Ves. jun.* 696. Lord *Mansfield*, in a judgment the authority of which, on every point, has been strongly questioned, *Sugden on Powers*, 498., *et seq.*, professed the same opinion. 4 *T. R.* 743. *n.* See *Goodtitle* v. *Bailey*, *Cowp.* 597.

That no court will enforce rights which it recognises as repugnant, may be admitted probably for an universal proposition; but courts which differ in the rights which they recognise, necessarily differ in the recognition of repugnancy. In no instance it is believed, (with the exception of the anomalous cases last cited), has a court of law adverted to a clause by which a testator assumes to dispose of the property of his devisee, in favour of a third person, for the purpose of declaring the right of the devisee, to the benefit offered by the will, repugnant to his right to retain the property of which that clause purports to dispose. It is obvious that such a clause, proceeding from one who is not the owner, cannot transfer the legal interest in the property; being distinct and unconnected, without words or necessary implication of reference, it cannot qualify the prior clause of devise as a condition; nor can it operate by estoppel, against the devisee, no party to the will, and whose title to his own estate, is not derived from the testator: failing, therefore, to *effect*, it serves only to *denote*, the purpose of its author; and becomes the peculiar subject of the jurisdiction of a court of equity, which, in administering the rights of its suitors, by enforcing the obligations affecting

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law? And if there be no equity against him, how is a court of equity to compel him to part with his inheritance,

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their conscience, executes the intention in which those obligations originate.

The instances in which courts of law have applied the maxim *allegans contraria non est audiendus*, are instances of *inconsistent titles*, whether to the same subject, (as a contemporaneous estate for life and in tail, in the same land; see *Jenkins*, *cent.* 1. case 27., or the claim of a tenant under and against his landlord, mentioned by Lord *Rosslyn*, 2 *Ves. jun.* 696.) or to different subjects, (as dower at once in the land taken, and in the land given in exchange; see the case cited, 3 *Leon.* 271. *Perk. s.* 319.) the assertion of one title being incomplete, without a negation of the other. It is a maxim, not of morality, but of logic; and compels election between claims, in respect, not of the injustice, but of the technical impracticability, of their contemporaneous assertion.

In courts of law, the suitor is permitted to assert rights, which, so far as the intention of the parties constitutes repugnancy, are confessedly repugnant. "If a man make a feoffment in fee of lands or tenements, either before or after marriage, to the use of the husband for life, and after, to the use of *A.* for life, and then to the use of the wife for life, *in satisfaction of her dower*, this is no jointure, within the statute, &c. and albeit in that case, *A.* should die, living the husband, and after the death of the husband, the wife entreth, yet this is no bar of her dower, *but she shall have her dower also. Co. Litt.* 36. *b.*, and see 4 *Co.* 2. *b.*, *Wilmot Opinions*, *p.* 188., 9 *Mod.* 152. So, if *A.* disseises *B.*, tenant for life or in fee, of the manor of *Dale*, and afterwards gives the manor of *Sale* to *B.* and his heirs, in full satisfaction of all his rights and actions which he has in or for the manor of *Dale*, which *B.* accepts, yet *B.* may enter into the manor of *Dale*, or recover it in any real action. 4 *Co.* 1. *b.*

No legal principle is better established, than that on which these decisions proceed, namely, that a freehold right shall not be barred by collateral satisfaction, *Co. Litt.* 3. *b.*, *Doctrina Plac.* 17. The like assertion of rights morally repugnant, has been sanctioned in many of the cases in which the courts

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ance, favoured as that title in general is both in law and equity?

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courts have overruled a plea of accord and satisfaction. See *Peyton*'s case, 9 *Co.* 77., *Grymes* v. *Blofield*, *Cro. El.* 541., *Co. Litt.* 212. The Plaintiff being permitted, on technical grounds, to enforce a claim for which he had received a compensation.

A devise or bequest of that which is not the property of the testator, is void at law. *Bransby* v *Grantham*, *Plowd.* 525, 526., *Litt. s.* 287., *Co. Litt.* 185. *b.*, *Perk. s.* 526., *Godolph. Orph. Leg. part* 3. *c.* 6. *s.* 5., *Swinb. on Wills*, *part* 3. *s.* 3. *n.* 8. *s.* 5. *prope fin. s.* 6. *n.* 17., *Dr. & Student*, *l.* 2. *c.* 25. *p.* 126. "If a man bequeath to one, another man's horse, in the law of the realm, the legacy is void to all intents, and he to whom the legacy is made, shall neither have the horse, nor the value of the horse." *Id. l.* 2. *c.* 55. *p.* 300., and see 3 *Co.* 29. *a.* To suppose that more favor would be shown to a clause in a *deed*, purporting to pass the property of a stranger, would be to contradict the established principle of construction. Being void, therefore, to all intents, such clause, whether in a deed or in a will, is inoperative at law, either for transferring the subject, or for qualifying a previous valid gift. To convert it into a condition, according to the equitable practice, by incorporation with a distinct clause, to which in terms it contains no reference, would be inconsistent with the rule, that conditions imposed by the particular intention of the individual, (as distinguished from conditions founded in the nature of the relation or contract between the parties, and by us denominated conditions in law) must, conformably to the feudal principle, *Craig. Jus. Feud. l.* 2. *dieg.* 5. *s.* 4. be expressed. *Co. Litt.* 201. *a.*

Many decisions may be found on the question, what words annexed to the clause of gift, for the purpose of connecting it with a distinct clause, constitute a condition; *ea intentione*, *ad effectum*, sufficient in a will, (*Co. Litt.* 236. *b.*), are not sufficient in a deed; (*Co. Litt.* 204. *a.*); but in no case, it is believed, has a court of law inferred a condition from words applicable only to another subject, and void in their obvious sense, as purport-

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If the other alternative is taken, the only way of avoiding the apparent contradiction of considering the estate

ing to pass an estate, not the property of the author of the clause.

The general principle of the law, on the subject of repugnant rights, is illustrated by the decisions on the concurrent claims to jointure and to dower.

The Statute of Uses (27 *H.* 8. *c.* 10.) having transferred the legal estate to the *cestui que use*, all women then married, would have become dowable of lands held to the use of their husbands, retaining their title to lands settled on them in jointure. To prevent this injustice, it is by that statute, (*s.* 6.) declared, that a woman having an estate in jointure with her husband, (five species of which are enumerated) shall not be entitled to dower; and a subsequent clause (*s.* 9.) reserves to the wife, a right to refuse a jointure assured during marriage. See *Wilmot's Opinions*, *p.* 184. *et seq.* It has been decided, that the species of estates enumerated, are proposed only as examples, and the courts have in construction extended the operation of the statute, to other instances, within its principle, though not within its words. *Vernon's* case, 4 *Co.* 1.

By the effect of this statute, therefore, no widow can claim both jointure and dower: jointure before marriage, is a peremptory bar of dower; jointure after marriage, she has an option to renounce.

Lord *Redesdale*, in support of the proposition, that election is a principle of law, (2 *Schoales & Lefr.* 451.) has referred to 3 *Leonard* 273. That report (which is cited in 1 *Eq. Ca. Ab. Dower B.*) contains only the argument of *Egerton* Solicitor-general; but the case (*Butler* v. *Baker*) is fully reported in 3 *Co.* 25., *Poph.* 87., 1 *And.* 348., and the decision proceeded on the construction of the statute. The passage to which Lord *Redesdale* refers, (3 *Leon.* 272. not 273.) is no more than a dictum of *Egerton*, in his argument. It is true, however, that the demandant in a writ of dower, might be barred by plea of entry and acceptance of lands settled in jointure after marriage, (*Doctrina Plac.* p. 149, see the form of pleading, *Co. Entr.* 172. *a.*), but it is also true, that that plea is founded on the act of *H.* 8. The act having declared jointure

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estate to pass by the will for one purpose, and not to pass for another, is to separate the legal estate from the bene-

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jointure a bar to dower, but reserved to the widow the option of refusing a jointure made after marriage, the question in that case was, "whether the widow had accepted or refused the jointure?" If she had not refused under the 9th, she was barred of dower by the 6th, section. The acceptance of the jointure constituting the case there specified. the widow was barred, not by her agreement, but by the statute, *Dyer*, 317. *a.*; and it is abundantly clear, that acceptance alone, without the operation of the statute, would not have formed a bar. *Vernon*'s case, 4 *Co.* 1. *Duchess of Somerset*'s case, *Dyer*. 97. *b.*

In *Gosling* v. *Warburton*, (*Cro. El.* 128., reported under various names, 1 *Leon*, 136., *Owen*, 154.) also cited by Lord *Redesdale*, and also referred to in *Eq. Ca. Ab.*, *ubi supra*, a rent charge was devised, expressly "in recompence of dower;" and the decision establishes only, that such a benefit so devised, is a jointure within the extended construction of the statute, and cannot be claimed after a recovery of dower.

The series of decisions under this statute, (the only instances in which the doctrine of election has been applied at law, in a manner analogous to its application in equity,) being founded expressly on the provisions of the statute, in contrast to the rules of the common law, constitute, it is conceived, a conclusive proof that the doctrine of election is equitable only; and one of the earliest instances (*Lacy* v. *Anderson*, *ante*, p. 398, n.) in which that equitable doctrine was enforced, is the case of a copyhold estate, devised and accepted, in satisfaction of dower, which not being within either the strict, or the extended, import of the statute, a jointure, would not have constituted a bar at law; and the aid of equity was requisite, to prevent the disappointment of the testator's express intention.

Accordingly, many authorities occur, in which the doctrine of election is described as exclusively equitable. In the report of *Noys* v. *Mordaunt*, by Chief Baron *Gilbert*, it is distinctly stated, that, "although the three daughters shall

beneficial, and to allot the former only to the devisee, and reserve the latter for the disposition of the Court; but where is the ground for that separation; the will, if it is to operate at all, having given both the legal and the equitable interest to the same person, and laid no ground in the intent of the devisor for any distinction in their destination?

The devisee's election to abide by his own estate may properly operate to preclude his taking the devised estate; but how can it make him take in a different character, and convert him into a trustee for another, to whom the testator has not expressed any intention to give it? The disappointed devisee in respect to the estate devised to another has no title whatever to that estate, either under or *dehors* the will; What equity then has he to it?

These are some of the difficulties which might have been urged by way of objection to this part of the doctrine of election, had it been now open to discussion; in the present case, however, some of these difficulties are ob-

shall at law take their proportion of the entailed lands, as co-heirs in tail, yet the eldest daughter in equity shall have an equivalent out of the fee-simple lands." *Rep. in Eq.* 3. Lord *Hardwicke* repeatedly refers to that case, which he considered the first of the kind, as founded on equity (1 *Ves.* 306., 3 *Bro. P. C. ed. Toml.* 178, 179.) a benevolent equity, (3 *Atk.* 715.), and describes the right to compel election as derived from an equity of the Court of Chancery, (2 *Atk.* 629.). That description is in substance adopted by Lord *Eldon*, (6 *Dowe* 179.) Lord Chief Justice *de Grey* has accurately distinguished between the mode of indirectly disposing of the property of a stranger, by express condition at law, or by implied condition in equity, 3 *Ves.* 530. And Lord Commissioner *Eyre* describes the practice of putting devisees to election, as a strong operation of a court of equity. 4 *Bro. C. C.* 24., 1 *Ves. jun.* 523.

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viated, and the doctrine in its full extent has been too long considered as settled to make it safe to disturb it.

The question then is, will the circumstances in which *Elizabeth Haward* is placed, prevent the application of this doctrine? Taking a benefit by the election, not of herself but of another, her situation is certainly in some degree peculiar. Under the election of the widow and children of *William Haward*, to abide by the will of his father *Serle Edward Haward*, the estates of the latter becoming divisible, the petitioner takes one-sixth; the question is, whether having by the election of other parties, acquired a right not intended for her by her mother, she can now insist on satisfaction for the disappointment of the devise contained in her mother's will, while she enjoys a benefit which has come to her against that will? That question is certainly new; no case has occurred in which an individual in part satisfied, deriving from one source a partial, has been declared entitled to additional, compensation. It has been ingeniously argued, that as the doctrine of bringing into hotchpot antecedent portions, is not applicable to a case of partial intestacy, the doctrine of compensation cannot be applied to partial disappointment; but that analogy will not, in my opinion, justify a departure from the ordinary rule. If the petitioner is the only individual disappointed, being deprived of an estate of 600*l.* a-year destined to her, and taking an estate of 145*l.* a-year only, and if the estate at *Nine Elms* is now in the hands of the Court, has not the established practice determined that it is to be applied in satisfaction of her as a disappointed devisee? To the extent of the difference between 145*l.* and 600*l.*, she sustains that character. Difficulties in the calculation of quantity may be removed by a reference to the Master; *plus* or *minus* cannot vary the rule; here is disappointment; and I think

think that the circumstances of novelty cannot so entrench on the entirety of the principle, as to authorise me in refusing compensation. (a)

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(a) The effect of election to take against the deed or will, has been the subject of much doubt; and though no contradiction, it is believed, exists in the decisions on that point, it seems not very easy to reconcile all the dicta. The principal question is, whether such election induces absolute forfeiture, or only imposes an obligation to indemnify the claimants whom it disappoints? Whether a devisee, asserting his right to property of which the will assumes to dispose, must relinquish the whole of the benefits designed for him, or so much only as is requisite to compensate, by an equivalent, the provision which he frustrates?

Such of the dicta as appear authorities for the doctrine of forfeiture, consist, with one exception, of general expressions only, not of direct opinions on the question. Thus it has been said, that a party cannot take under and against a will; that he must abide *in toto* by the will, or by his inconsistent title; that no one taking under a will can contravene it; that he must part with his own estate, or not take the bounty; *Cowper* v. *Scott*, 3 *P. W.* 119. *Cookes* v. *Hellier*, 1 *Ves.* 235. *Morris* v. *Burroughs*, 1 *Atk.* 404. *Pugh* v. *Smith*, 2 *Atk.* 43. *Wilson* v. *Mount*, 3 *Ves.* 194. *Wilson* v. *Lord John Townshend*, 2 *Ves. jun.* 697. *Broome* v. *Monck*, 10 *Ves.* 609.; expressions which, (considering that a party electing to take against a will on the terms of compensation, takes the surplus after compensation, under it) in strictness authorise the doctrine of forfeiture: but it may be reasonably doubted, whether in these dicta the Court adverted to that complete case in which alone the question arises (a). Their real import seems to be no more than the general proposition on which the doctrine of election rests; that a party, claiming under one

(a) The distinction appears to have escaped the attention of the learned and acute author of the Systematical View of the Laws of *England;* after stating, that " a devisee must either acquiesce in the will, or renounce any benefit thereby," he subjoins the substance of the decree in *Streatfield* v. *Streatfield*, without observing the important qualification there introduced. 3 *Woodd.* Lect. 491.

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The only remaining question is, on what terms must compensation be made? From what time is the estate at

clause in a will to his advantage, shall not treat as a nullity another clause at his expense, where the two clauses are, in the intention of the testator, parts of one scheme of disposition; shall not assert at once the whole of his claims under the will, and the whole of his claims against it; a meaning less equivocally expressed by Lord *Talbot* in *Hervey* v. *Desbouverie;* "it would be unreasonable to admit a latitude of taking by the will, as far as that makes for the party, and likewise by the custom, as far as that will go, and waive the other part of the will which makes against him." *Ca. Temp. Talb.* 136. In none of these cases did the precise question of forfeiture or compensation arise; it does not appear, that the fund relinquished was more than sufficient to compensate the disappointed claimants; there is no suggestion of the existence of a surplus; in which event only the effect of compensation would differ from the effect of forfeiture.

The words of Lord *Camden*, in *Villareal* v. *Lord Galway*, 1 *Bro. C. C.* 292, n. and of Lord *Erskine*, in *Thellusson* v. *Woodford*, 13 *Ves.* 220, 221, (see 2 *Mer.* 93.) incline, certainly, to the doctrine of forfeiture; but in those cases, as in the former, the question was not distinctly presented to the Court. The judgment of Lord *Eldon*, in *Green* v. *Green*, 2 *Mer.* 86, has, however, been generally understood as sanctioning that doctrine; and it cannot be denied, that some expressions in the printed report intimate such an inclination of opinion, and form by far the strongest authority on that side of the question; but it must be recollected, 1. That those expressions amount neither to a decision, nor to a positive opinion. 2. That the case stated by the Court for the purpose of raising the question, was a case of express contract, as distinguished from an implied condition imposed by the form of a will, and that no dissent was intimated from the authorities cited, sanctioning, in the latter instance, the doctrine of compensation. 3. That the very ungracious character of the claim advanced by the Defendant, presented a strong inducement to the Court to struggle against him, and not to decide in his favour till satisfied that no other decision could be reconciled with its

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at *Nine Elms* to be given up to the petitioner? The election is retrospective; reverting to the time of the will,

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dicial duty. 4. That on a subsequent, as well as on a former, occasion, Lord *Eldon* has distinctly, in the instance of wills at least, sanctioned the doctrine of compensation. That doctrine seems conclusively established by the following series of dicta and decisions.

In *Webster* v. *Mitford*, (*June* 1708,) the testator directed the sum of 4000*l.* to be invested in the purchase of lands, one moiety of the rents of which was to be paid to his widow, and the other moiety to *E. W.* and *J. R.* during their lives, with remainder, after the determination of those estates, to *M. H.* and *W. W.*, and an express proviso that, if his widow insisted on her marriage-agreement, the bequest to her should be void, and in such case the moiety originally devised to her was limited to *E. W.* and *J. R.*, and after their death, to descend as the other moiety: the widow electing to take a moiety of her husband's personal estate, to which she was entitled under her marriage-settlement, and that demand having caused a deficiency in the funds for payment of legacies, the Court directed, that such part of the profits of the sum of 4000*l.* as by the will was intended for the widow, should be applied during her life towards supplying the deficiency. In this case the widow's election, by the express words of the will, operated a forfeiture, yet the Court assumed jurisdiction to qualify the effect of that forfeiture; and, instead of permitting it, by determining her interest, to accelerate the enjoyment of the estates in remainder, sequestered her interest, for compensation to those whom her election disappointed; and assumed that jurisdiction, according to the only printed note of the judgment, on general principles of equity. "The wife's waiving the devise, and being let in upon the personal estate, wrought a deficiency in the legacy. Lord Chancellor thought it the highest equity, that *B.*, who had by the waiver gained the possession of an estate, of which he would have had but a reversion if the wife had accepted the devise, should contribute what he was benefited by the waiver, towards raising a fund for payment of the legacies; and His Lordship thought 4000*l.* in reversion worth but 3000*l.* in possession,

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will, the parties electing reject all that comes under it; consequently they have in the interval enjoyed the pro-

sion, and decreed that, according to this estimate, the value of the lands, being settled by the Master, should be charged, if the legacies required it." 2 *Eq. Ca. Ab.* 363, marg. This decision, therefore, established the principle, that the fund forfeited, though under an express proviso, by election to take against the will, should be sequestered for compensation to those whom that election disappointed. A statement of the case (which in other respects, particularly in its analogy to *Lewis* v. *Madocks*, 8 *Ves.* 150. 17 *Ves.* 48. 19 *Ves.* 66., and *Prebble* v. *Boghurst*, *ante*, p. 309, appears not unimportant) extracted from the register, is subjoined, p. 449, (D.).

In *Streatfield* v. *Streatfield*, 1735, *Ca. Temp. Talb.* 176, the testator having devised to his daughters an estate of which, under a settlement in pursuance of articles before marriage, he was, in the consideration of a Court of Equity, tenant for life only, and to his grandson, the infant tenant in tail under the articles, other estates of which he was seised in fee; Lord *Talbot* C. decreed, that the heir, on attaining majority, should make his election between the articles and the will, and that if he elected to take under the former, a sufficient part of the rents of the lands devised to him accruing during his life, should be invested in the purchase of freehold estates, of which so much as should be of equal value with the lands comprised in the settlement and devised to the daughters, should be conveyed to them in fee. See the declaratory and mandatory parts of the decree from the register, *post* p. 447, (C.).

This decision is a distinct authority for the doctrine of compensation, applied by means of pecuniary appreciation to specific devises. The surplus value, after compensation to the disappointed devisees, was not forfeited, but devolved to the infant heir, in the character of devisee; the Court interfering with his title under the will, so far only as was necessary to indemnify those whom his election disappointed.

In *Bor* v. *Bor*, 1756, 3 *Bro. P. C. ed. Toml.* 167, the decree pronounced by the House of Lords declared, that the express

property of another; to retain the past rents and profits which they have received with no other title than that con-

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express proviso in the will, prevented the implied condition by which the appellant, electing to take against the will, would have been compelled to convey to the devisee whom he disappointed, so much of the lands devised as should be equal in value to those of which he was deprived by the election, (p. 177. Lords' Journals, v. 28, p. 456.). The argument of Lord *Hardwicke*, indeed, on which this decree was founded, states the rule thus: that if the elder son defeats the will in any part, he shall not at the same time take any benefit under it (3 *Bro. P. C.* p. 178, n.); expressions in strictness inconsistent with the doctrine of compensation, though probably employed in a general sense, and without reference to the distinction in question; but in instances of contradiction between the judgment and the decree, the rules of interpretation evidently require that credit should be given to the decree, as the latest and the most authentic evidence of the meaning of the Court.

In *Ardesoife* v. *Bennet*, 1772, 2 *Dick.* 463, the heir, to whom the testator had bequeathed a legacy of 5000*l.*, disputing the validity of a devise of copyhold, and the devisee claiming to be satisfied out of that legacy, the value of the copyhold estate, in case the devise was void, Sir *Thomas Sewell* declared the administrator of the heir entitled to the legacy, subject to any satisfaction which he might be liable to make to the devisee respecting the copyhold premises; and by consent 1600*l.* were transferred to the accountant-general "to make good to the devisee what she might be deemed entitled to, in case she should lose the benefit of the devise." It was afterwards declared, that the heir had elected to take the legacy, and that the devisee was entitled in equity. Whether that case involved the question of election may be doubted, for the devise seems valid; (see the cases collected by Mr. *Cox*, 3 *P. W.* 360, n. 1.) but the Court proceeded on that assumption, and the provisional order clearly adopted the principle of compensation; a portion of the legacy bequeathed to the heir being appropriated to indemnify the disappointed devisee, his administrator was declared entitled to the residue.

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conferred by the will, would be to claim under it; renouncing the will, they admit that they have been in posses-

In *Lewis* v. *King*, 1789, *2 Bro. C. C.* 600, Lord *Thurlow* is represented to have said, the testator "has disposed of the estate of another person, giving that person other property; then the party taking that property disposed of, must give up that which was given in exchange for it, to reimburse the devisee for his disappointment. Every thing the *Kings* take should be brought into Court as a security for the purposes of the will," p. 603. Expressions descriptive not of absolute forfeiture, but of sequestration for the purposes of the will, and to the extent of compensation only, and not including therefore the surplus after compensation; and such seems to have been the doctrine of Lord *Alvanley*. *Freke* v. *Lord Barrington*, *3 Bro. C. C.* 284, 286. *Whistler* v. *Webster*, *2 Ves. jun.* 372, and *Ward* v. *Baugh*, *4 Ves.* 627. (*a*)

In *Pulteney* v. *Darlington* the doctrine of compensation is explicitly propounded by Lord Chief Justice *de Grey* (*b*), and

(*a*) In *Macnamara* v. *Jones*, 1785, the testator's daughter claiming a sum of 10,000*l.* under a marriage-settlement, and also benefits under the will, which contained a direction that the annuities, &c. thereby given should be in satisfaction of all demands which the several takers had on the testator's estate, the decree declared that the daughter must elect to take under the will, or to insist on her other claims, "in which case, all which she might claim under the said will, and which she hath received or might hereafter receive by virtue thereof, must be accounted for, and applied to make good to the other residuary devisees the expense of satisfying the said claims." 1 *Bro. C. C. ed. Belt*, 482. n. This declaration seems, at the first view, an authority for the doctrine of sequestration for the purpose of compensation, but upon examination of the statement of the case, it may be doubted whether it assumes more than the common principle of election; the will disposing of the whole of the testator's property to the residuary devisees, the extinction of the claims under the settlement, by the effect of that principle, operated in their favour.

(*b*) Ante, p. 423. A full report of Lord Chief Justice *de Grey*'s judgment on the question of election is an important desideratum. The obscurity of this very complex case has been much augmented by the imperfection of the reports. The will of Sir *William Pulteney*,

possession of an estate without title. There must be a retrospective account of rents and profits, and an account

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and recognised by Lord *Rosslyn* (*a*). The decree indeed declared, that *Frances Pulteney*, in case she should elect to take an estate tail under the will of Sir *William Pulteney*, would not be entitled to any estate under the will of General *Harry Pulteney* (*b*); expressions which may be understood as implying forfeiture; and to that apparent contradiction between the explicit doctrine of the judgment and the implied principle of the decree, the observation of Lord *Eldon* on that case seems directed (*c*). It is clear, however, that the decree was not framed on the principle of forfeiture. Mrs. *Pulteney* having long delayed her election, a reference to the Master was directed to inquire, whether it would be more beneficial for her to take under the will of Sir *William Pulteney*, or of General *Harry Pulteney*; the Master's report, that it would be more beneficial to take under the former, must have been founded on pecuniary appreciation, and on the conclusion that the benefits conferred by that will were more valuable than those relinquished; in which case, no surplus existing after compensation, the question of forfeiture could not arise. By a subsequent arrangement, the benefits given to her by Sir *William Pulteney*'s will were estimated at 61,000*l.*, and that sum she secured in trust for the uses of the will of General *Harry Pulteney*, by a charge upon the estates of Sir *William Pulteney* (*d*); an arrangement founded on the principle of compensation.

The expressions of Chief Justice *Eyre*, in *Blake* v. *Bunbury* (*e*), 1792, explicitly recognise that principle, and have been repeated with approbation by Lord *Eldon* (*f*); and, on this foundation, the decree in that case rests. (*g*)

ney, upon which the question arose, is not stated by Mr. *Brown*, (*P. C.* v. 7. p. 530. *ed. Toml.*), an omission which renders his report unintelligible. The will may be found in 2 *Ves. jun.* 544.

(*a*) 2 *Ves. jun.* 566. (*b*) 7 *Bro. P. C. ed. Toml.* 546.
(*c*) 2 *Mer.* 94. (*d*) 3 *Ves.* 385.
(*e*) 1 *Ves. jun.* 521. *ante*, p. (*f*) 6 *Dowe*, 187.
(*g*) 1 *Ves. jun.* 527.

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count of sums expended for melioration of the estate, which must be reimbursed.

His

In *Vane* v. *Lord Dungannon* (*a*), Lord *Redesdale* decided, that, under a will implying in the testator an erroneous supposition of the interests of some of his devisees in a distinct fund, settled by a different instrument, devisees asserting their actual, in preference to their supposed, rights in that fund, must renounce all benefit of the will. It seems doubtful, whether the Court designed forfeiture or compensation as the effect of election to take against the will; the decree directs that the benefits intended for the recusant devisee, should be accumulated for the benefit of the disappointed claimants, in proportion to their interests in the fund claimed (*b*), without limitation of amount, or provision for a surplus; the judgment imports (*c*), that the devisee must relinquish what the will gave in order to compensate the loss sustained by the other daughter. The distinction between forfeiture and compensation seems not to have been, nor did the circumstances of the case require that it should be, an object of attention. The interest taken under the settlement being pecuniary only, if the benefits offered by the will were more valuable, (in which event alone the question could arise,) it cannot reasonably be supposed that the devisee would elect to take against the will.

Lord *Eldon*'s elaborate judgment in *Lord Rancliffe* v. *Parkyns*, 1818, 6 *Dowe*, 149, containing one of the latest dicta on the question, explicitly adopts the doctrine of compensation. "If I choose to devise my real estate to the Noble Marquess opposite, and in the same will I dispose of an estate which is not mine but his, a court of equity will say, that he shall take no benefit from that will, unless he makes good the whole of the will: and the Noble Marquess would not take therefore unless he allows the whole of the will to be effectual, *i. e.* suffers his own to be disposed of according to the will, or makes compensation for (*d*) as much as he takes of

(*a*) 2 *Schoal. & Lefr.* 118. (*b*) P. 134. (*c*) P. 130

(*d*) The term "for" seems not perfectly correct, unless understood as synonymous with the phrase "to the extent of." — Compensation

His Honor doth order that the said Master's said report, bearing date the 20th day of *May* 1818, be confirmed,

of mine," p. 179. This passage is in conformity with the previous dictum of the same distinguished judge, that "where a case of election is raised, it does not give a right to retain the thing itself; though it may give a right to compensation out of something else." *Dashwood* v. *Peyton*, 18 *Ves.* 49 (*a*).

The doctrine of compensation has been thus stated, with characteristic precision, by Sir *William Grant*. "That an heir, to whom an estate is devised in fee, may be put to an election, although, by the rule of law, a devise in fee to an heir is inoperative, I should have thought perfectly clear, independently of Lord *Cowper*'s decision in the case in *Gilbert* (*b*); for if the will is in other respects so framed as to raise a case of election, then, not only is the estate given to the heir under an implied condition, that he shall confirm the whole of the will, but in contemplation of equity the testator means, in case the condition shall not be complied with, to give the disappointed devisees out of the estate, over which he had a power, a benefit correspondent to that, of which they are deprived by such noncompliance. So, that the devise is read, as if it were to the heir absolutely, if he confirm the will; if not, then in trust for the disappointed devisees as to so much of the estate given to him, as shall be equal in value to the estates intended for them." *Welby* v. *Welby*, 2 *Ves. & Bea.* 190, 191.

This deduction of authorities appears (in the instance at least of election under wills and deeds of donation) to establish two propositions; 1. That, in the event of election to

is made for that which the devisee retains of his own contrary to the design of the will, but (if necessary) to the extent of that which he derives from the testator. The former is the subject for which compensation is given, the latter the fund from which it is taken.

(*a*) The judgment of Lord *Eldon*, in *Ker* v. *Wauchope*, 1819, (1 *Bligh*, 1.), published while these notes were in their progress through the press, contains dicta to the same effect. See p. 25, 26.

(*b*) *Anon. Gilb. Ca. in Eq.* 15.

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firmed, and His Honor doth declare that the petitioner *Elizabeth Haward* is entitled to the estate of the testatrix *Ann Haward*, widow, in the pleadings named, situate at *Nine Elms*, &c., in and by her will devised to or for the benefit of the Plaintiff, *Jane Haward*, widow, and her children, as and by way of compensation to the said *Elizabeth Haward*, as far as the same will extend, for the loss sustained by her of the estates and benefits devised to and intended for her, in and by the will of her mother the said *Ann Haward*, widow, which the said *Jane Haward* and her children have elected to take (under the decision of this Court) against the said will; and it is ordered that the said *Elizabeth Haward* be forth-

take against the instrument, courts of equity assume jurisdiction to sequester the benefit intended for the refractory donee, in order to secure compensation to those whom his election disappoints: 2. That the surplus, after compensation, does not devolve as undisposed of, but is restored to the donee, the purpose being satisfied for which alone the Court controlled his legal right.

Assuming that the doctrine of election is equitable only (*a*), the infliction of forfeiture on a devisee electing to take against the will, beyond the extent of compensation to those whom his election disappoints, would be inconsistent with the principle on which the doctrine rests. By the assumption, the devise of the testator's property has vested the legal estate in the devisee; but a court of equity, (in the contemplation of which his conscience is affected by the implied condition) interfering to control his legal right for the purpose of executing the intention of the testator, is justified in its interference so far only as that purpose requires. In the common case of election to take against a will containing a devise of the property of the testator to his heir, and a second devise of the property of the heir to a stranger, the express intention of the testator, that the heir should enjoy the subject of

(*a*) Vide *ante*, p. 425. & seq. n.

the

forthwith let into possession of the said estate at *Nine Elms* aforesaid, and into the receipt of the rents and profits thereof accordingly; and it ordered that the said Master, in taking the accounts of the rents and profits of the testator *Serle Edward Haward's* estates, which are directed by the decree made in this cause, fix and allow to the said *Elizabeth Haward*, as between her and the said Plaintiff, *Jane Haward* and her children, such sum as the said Master shall think proper, by way of compensation, in the nature of occupation rent for the said estate at *Nine Elms*, from the death of the said testatrix, *Ann Haward*, widow, until the said *Elizabeth Haward* shall be so let into the possession thereof as hereinbefore

the first devise, and the stranger, the subject of the second, is defeated by the refusal of the heir to convey the latter; and a court of equity therefore restrains him in the enjoyment of the first, till the condition, under which, in the contemplation of that Court, it was conferred on him, is satisfied. The intention of the testator, having become impracticable in the prescribed form, is executed by approximation, or in the technical phrase, *cy pres*. The devise to the stranger, rendered void as a gift of the specific subject, is effectuated as a gift of value, and effectuated at the expense of the heir by whose interference its strict purport has been defeated. By this arrangement, the intention of the testator in favour of the stranger, though defeated in form, is, in substance, accomplished; his intention, in favour of the heir, equally express, remains to be considered.

If the value of the estate retained by the heir exceeds the value of the estate designed for him, his own act is his indemnity; the benefit which he enjoys transcends the intention of the testator; but if the value of the estate of which the Court deprives him, exceeds the value of the estate of which he deprives the devisee, what disposition is to be made of the surplus? Considered as a gift of value, (and on that principle the equitable arrangement is founded,) the devise to the stranger entitles him to an equal amount, but is no authority for bestowing on him more; and the undisputed intention of the testator being that the subjects of both devises

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fore directed; and it is ordered that the said Master do take an account of all sums of money which he shall find to have been laid out and expended by the said Plaintiff and her children, in repairs and improvements of the said estate and premises situate at *Nine Elms* aforesaid, since the decease of the said *Ann Haward*, during the time they have been in possession thereof, and it is ordered that the said Master do deduct the same from what he shall certify to be due from the said Plaintiffs

vises should be enjoyed by the heir and the devisee, what is not transferred to the devisee must remain with the heir.

A court of equity, which assumes jurisdiction to mitigate the rigor of legal conditions, and substitute for a formal a substantial performance, would act with little consistency in enforcing, by the technical doctrine of forfeiture, to the eventual disappointment of the testator's intention, a condition, not expressed in the will, but supplied by the construction of the Court, for the single purpose of executing that presumed intention.

In the instance of pecuniary claims, the question can scarcely arise, since, in a choice between two sums of money, no probable motive exists for electing the smaller; but supposing that case, as a gift to a stranger of the benefit of a settlement under which the heir of the testator was entitled to 1000*l.*, and a bequest of 5000*l.* to the heir, and election by him to take under the settlement; by the deduction of 1000*l.* from the bequest, in satisfaction of the disappointed legatee, and by payment to the heir of the remaining 4000*l.*, together with the sum due under the settlement, the intention of the testator would be executed in substance, though not in form; the heir would take 5000*l.* and the legatee 1000*l.*: by any other arrangement that intention, which must inevitably be violated in form, would be substantially defeated.

The case of specific gifts may, indeed, involve some difficulty of appreciation, by the existence of local attachments, which admit neither accurate estimation nor adequate compensation; but it is on the principle of appreciation that the Court interferes, to transfer to one party, that which is expressly, and at law effectually, given to another; and the dif-

tiffs by way of such occupation-rent as aforesaid; and it is ordered that the Plaintiffs and the Defendant, *William Haward*, do pay unto the said *Elizabeth Haward* what the said Master shall so certify to be due to her in respect of such occupation-rent as aforesaid, after such deduction as aforesaid. — Reg. Lib. A. 1818. fol. 1173 — 1175.

difficulty has been repeatedly encountered. (*a*) Should any case present impediments of this nature practically insurmountable, the doctrine of compensation might become, in that instance, inapplicable, but would not for that reason cease to be the general rule of the Court.

By the doctrine of compensation, and the process of sequestration for executing it, (though justly described as a strong operation,) the intention of the testator is, so far as circumstances admit, effected; by the doctrine of forfeiture that intention would be defeated.

(A)

LACY *v.* ANDERSON. (*b*)

WHEREAS the said Plaintiffs exhibited their bill into this court, against the Defendants, for stay of their proceeding in a writ of dower, for that, as the Plaintiffs suppose, the said *Margaret*, one of the Defendants, had certain copyhold lands to her devised, in recompence of her dower, which she, after the death of her former husband, of whose lands she seeks to be endowed, accepted, and entered into, and has enjoyed above the space of twenty years; for as much as this Court was this present day informed by Mr. of counsel on the Plaintiffs' behalf, that the Defendants had demurred to the said bill, for that the Plaintiffs confess her to be dowable by law; and that the said copyhold lands, so to her the said *Margaret* devised, can be no bar of dower; and for

(*a*) In *Webster* v. *Mitford, Streatfield* v. *Streatfield, Ardesoife* v. *Bennet, Pulteney* v. *Darlington;* and see *Bor* v. *Bor, Gretton* v. *Haward.*

(*b*) Vide *ante*, p. 398. n

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that also it seemed to this Court, that the said *Margaret* is not in conscience to have both her dower and the said copyhold lands also, which she had only in recompence of dower; it is therefore ordered, that if the said Defendants shall not, by *Friday* next, show unto this Court some sufficient cause to the contrary, then a subpœna is awarded against them, to make perfect and direct answer to the said Plaintiffs' bill of complaint. — Reg. Lib. A. 1581. fol. 381.

14 *June* 1583. The Defendants were permitted to proceed to judgment in the trial at law, with stay of execution, and a subpœna was awarded to the Plaintiffs, commanding them to show cause why the Defendants should not have execution. — Reg. Lib. A. 1582. fol. 569.

The register of 1584 and 1585 has been searched, without discovering any further entry in this cause.

(B)

EDWARD ROSE, Plaintiff, EDWARD REYNOLDS, and ROSE, his Wife, Defendants. (a)

FOR as much as this Court was this present day informed on the said Plaintiff's behalf, by Mr. being of his counsel, that the said Defendants have now of late brought a writ of dower at the common law against the Plaintiff, whereby the said *Rose* seeks to be endowed of the lands and tenements of *Edward Rose*, her late husband, deceased, albeit she heretofore had a lease for certain years, yet enduring, assured unto her by her said late husband, in recompence of her dower, which she agreed to accept, and has also enjoyed accordingly from the death of her said late husband, being about twelve years since; and albeit a decree was made in this case, the 6th day of *February*, in the ninth year of her majesty's reign, that the said Defendants should not (in respect the same lease was proved to be assured as aforesaid) claim or challenge any dower, neither against one *Palmer* and others, who were Plaintiffs in the said decree, and had purchased certain of the lands whereof the Defendant sought to be endowed, neither of any of the lands or tenements whereof the said late husband of the said Defendant, *Rose*, was seised

(a) Vide *ante*, p. 398. n.

during

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during the coverture, it is therefore ordered, that a subpœna be awarded against the Defendants, returnable *immediatè*, to show cause wherefore they should not be enjoined as well from any demand of dower against the Plaintiff (being heir to the said late husband of the said *Rose*) as they were against the said purchasers who were Plaintiffs in the said decree; if it be true that there was such an agreement, that the said lease should be accepted, and was assured in recompence of the said *Rose* as aforesaid. — Reg Lib. A. 1580. fol. 204.

Injunction granted to stay the action at law, the Defendants not having appear to the *subpœna*. — Reg. Lib. A. 1580. fol. 252. (*a*)

(C)

STREATFIELD *v.* STREATFIELD. (*b*)

"His Lordship doth declare, that the will of the said testator, *Thomas Streatfield*, is well proved, and that the Plaintiff, *Thomas Streatfield*, is entitled in equity, to an estate tail in possession, in the houses and lands mentioned in the settlement of the 5th of *April*, 1698; but in regard the said testator, the Plaintiff's grandfather, has taken upon himself to devise the said houses and lands by his will, and the said Plaintiff is an infant, and therefore cannot declare his consent to submit to the said will; His Lordship doth order that the said Plaintiff, within six months after he comes of age, do signify to this Court whether he consents to waive his equitable right to the said houses and lands, under the said articles of the 31st of *May*, 1677, and the said settlement of the 5th day of *April*, 1698; and in case the said Plaintiff

(*a*) The interference of the Court in this instance was, perhaps, founded rather in express contract, than in the general doctrine of election. So, "27 *Car.* 2. in *Gladstone* v. *Ripley*, Lord *Nottingham* held, first, that a jointure of a copyhold is no bar of dower at common law; secondly, that an agreement precedent to marriage to accept it as such, makes it a bar in equity; and therefore he staid the suit at law." Lord *Northington*, 2 *Eden*, 59, 60.

(*b*) Vide *ante*, p. 436. n.

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shall signify such his consent, then the several estates devised by the said will, are to be held and enjoyed by the respective devisees, according to the limitations in the said will; but in case the said Plaintiff, *T. S.* shall neglect or refuse to signify such his consent, within the time before mentioned, then it is ordered and decreed, that the possession of the houses and the lands comprised in the said settlement of the 5th of *April* 1698, be then delivered to him, and that all proper parties, as Mr. *S.* one of the Masters, &c. shall direct, do join in conveying the same to him, and the heirs of the body of his father begotten on the body of his mother, and that he and they be quieted in the enjoyment thereof from thenceforth, until such conveyance shall be made; and in that case, it is ordered that the said Master do see a sufficient part of the rents and profits of the other estates devised by the will of the said *T. S.*, the Plaintiff's grandfather, to the Defendants, *Henry S.*, *Thomas S.*, and *William S.*, in trust for the Plaintiff *T. S.* for his life, which have arisen or shall grow due during the life of the said Plaintiff *T. S.* (but without prejudice to what shall be allowed for the said Plaintiff's maintenance during his minority), be invested in the purchase of freehold houses or lands of inheritance in fee simple, and so much of them as shall be of equal value to such of the houses and lands devised to the Defendants, *Margaret S.* and *Martha Polhill*, in possession, as are comprised in the said settlement of the 5th of *April* 1698, are to be conveyed to the said Defendants, *M. S.* and *M. P.* and their heirs, as tenants in common, and the residue thereof are to be conveyed to the like uses, and upon the like trust, as the lands devised to the Defendants, *H. S.*, *T. S.*, and *W. S.*, are limited by the said will." An account was ordered of the rents and profits received by the Defendant *H. S.*, out of the lands devised to him and *T. S.* and *W. S.* with the usual directions; an allowance, to be settled by the Master, for the maintenance of the Plaintiff *T. S.*, to be paid out of the rents of the estates devised to *H. S.*, *T. S.*, and *W. S.*, and the surplus to be invested in government or real securities. "And in case the said Plaintiff *T. S.* shall signify his consent as aforesaid within the time before mentioned, then it is ordered that the surplus of such rents and profits, over and above what shall be allowed for his maintenance, and the produce thereof be paid and delivered to him; but in case

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case the said Plaintiff shall neglect or refuse to consent, then the same are to be applied according to the directions before given; and in case there shall be any residue, the same is likewise to be paid to him." Reg. Lib. B. 1735. fol. 205.

(D)

ELIZABETH WEBSTER, Widow, JANE RICHARDSON, Widow, and Others - - PLAINTIFFS.
MARGARET MITFORD, and Others, - DEFENDANTS.

UPON the hearing, &c., the substance of the Plaintiffs' bill appeared to be, that *Michael Mitford*, late brother of the Plaintiffs, *E. Webter* and *J. Richardson*, and the Defendant, *Margaret Mitford's* late husband, did, in *February* 1706, make his will in writing, and reciting, that upon his marriage with the Defendant, *Margaret*, he did make some articles or agreement for securing 1200*l.* which he had in portion with her, or leaving her some other consideration in lieu thereof, therefore, in full performance of the said articles of agreement, he did devise unto the said Defendant, *Margaret*, his wife, the lease of his house at *Clapham*, and all his estate and interest in the said house, and all his plate, rings, linen, bedding, and other household goods whatsoever, and also 100*l.* *per annum* issuing out of the Exchequer, which he purchased for the said Defendant, *Margaret's*, life, upon the act of parliament for tonnage, with the order and tally; and devised unto his executors (*George Mertins, Thomas Nisbett* and *William Mitford*, whom he also appointed trustees) the sum of 4000*l.*, upon trust that his said executors should, with all convenient speed after his decease, purchase lands of inheritance in fee-simple of the yearly value of 200*l.*, or thereabout, in some Northern county, within sixty miles of *Newcastle-upon-Tyne*, where he was born, to be settled in such manner as might best answer his will; and that the interest and proceeds of the said 4000*l.*, until such purchase made, should be paid to such persons, and in such manner, as the rents and profits of the lands, when purchased, were devised and were made payable, and did devise one moiety of the rents and profits of the lands so to be purchased, unto the Defendant, *Margaret*, his wife, for her life, subject, nevertheless, to the proviso in the will, and hereafter men-

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tioned, and the other moiety to the Plaintiffs, *E. Webster* and *J. Richardson*, his two sisters for life, equally to be divided between them, and to be by them held and enjoyed severally as tenants in common, without benefit of survivorship, and from the determination of the said several estates, and as the same should severally drop by the deaths of the said parties, such part immediately to descend and come to the Plaintiffs, *Mary Harrison* and *Winifred Webster*, his two nieces, to be equally received and enjoyed between them; but in case the Plaintiff, *Mary Harrison*, should marry any person, who by his family should be a gentleman of the name of *Mitford* or *Midford*, by birth, then all and singular the said premises so to be purchased as aforesaid, should, after the respective deaths of the defendant, *Margaret*, and of the Plaintiffs, *Elizabeth* and *Jane*, descend and come to and be enjoyed by the said *Mary*, and such husband, for and during their natural lives and the life of the longer liver of them, and from and after their decease, to the first son of the body of the said *Mary* by such husband, which first son he desired might be christened by the name of *Michael*, and to the heirs male of the body of such first son, and, for default of such issue, to the second and every other son and sons of the body of the said *Mary* by such husband, and the heirs male of the body of such sons successively in tail male, provided that if the said Plaintiff, *Mary*, should not by her first marriage intermarry with one of the name and family aforesaid, or in case she should, and such husband should happen to die without such issue male as aforesaid, then the said premises so to be purchased as aforesaid, should descend and come to the Plaintiff, *Winifred*, upon the same terms; and in case neither of his said nieces should, by their first marriage, intermarry with one of the name and family aforesaid, or if they should both happen to die without such issue male as aforesaid, then the said premises so to be purchased, should descend and come to his cousin, the Plaintiff, *Michael Mitford*, for life, and to the first, second, and every other son and sons of the said Plaintiff, *Michael Mitford*, and the heirs male of the body of such sons successively in tail male, and for want of such issue, to his own right heirs for ever; and the testator, by his said will, declared, that the said bequests, thereby given to his wife, should be in full recompence of what she might or could claim by virtue of the said articles or agreement, or other-

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otherwise howsoever; and that if she refused to accept the same, then all and every the devises and bequests aforesaid should become absolutely void as to his said wife, and in such case, he devised the moiety of the rents and profits of the premises to be purchased and devised as aforesaid, to his wife, to the Plaintiffs, *E. Webster* and *J. Richardson*, in such manner as the other moiety is devised to them, and after their deaths to descend and go in such manner as the said other moiety is limited; and as to the other legacies devised to his wife (in case the same became void as aforesaid) the same to go to the Plaintiffs, his two sisters and two nieces equally among them, and gave to his said two sisters and the survivor of them the 25*l.* *per annum* which he purchased in their names and for their lives upon the act of parliament for tonnage, with the tally and order for the same, and 50*l.* a-piece to buy them mourning, and to the Plaintiff, *Mary Harrison*, 600*l.*, and to the Plaintiff, *Winifred Webster*, 400*l.*, to be paid at their respective ages of twenty-one years or marriage, which should first happen; and, if either of them should die before marriage, her legacy to go to the survivor; and if either of them should marry without the consent of her mother, if living, to forfeit and lose one-half of her legacy, which was to go and be paid to her sister; and that the said several sums should be put out at interest, upon good security to be approved by the executors, until the same should become payable, and the interest thereof, in the mean time, to be applied for their maintenance; and after several other legacies given to other persons in the bill named, he gave all the rest and residue of his real and personal estate, unto his said wife, two sisters, and two nieces, equally among them, share and share alike, and to the minister and churchwardens of the parish where he should die, 50*l.*, to be laid out in such manner and for such uses as in the will is particularly directed; and in *August* 1707, the said *Michael Mitford* died without issue; the Defendants, *Mertins* and *Nisbett* two of the executors, proved his will, and took upon them the execution thereof; that in *September* 1694, the said testator paid into the Exchequer, as a contribution, the sum of 208*l.* 6*s.* 8*d.*, upon an act of parliament then lately passed, for granting several rates and duties for tonnage of ships and vessels, for which said sum of 208*l.* 6*s.* 8*d.* the said testator had a tally and order out of the Exchequer, to entitle him to receive the annual sum of

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25*l.* during the lives of the Plaintiffs, *E. Webster* and *J. Richardson*, his two sisters, and the life of the longer liver of them, who were nominees for him in the said order; and the said testator, designing the benefit of the said annuity for them after his decease, did, by deed poll, under his hand and seal, dated the 30th of *May* 1695, declare and agree, that the said annuity should be to the use and benefit of himself for life, and after his decease, to the use and benefit of his mother, *Mary Mitford*, and the Plaintiff, *E. Webster*, equally, and after the death of his said mother, then to the use and benefit of his said two sisters, *E. Webster* and *J. Richardson*, equally between them; that the said *Mary Mitford*, the mother, died in the life-time of the testator, and the said testator being also dead, the Plaintiffs, *E. Webster* and *J. Richardson*, are advised that they are entitled to the said 25*l.* annuity in their own right, by virtue of the said deed-poll; that the Defendants, the executors, having possessed themselves of the said testator's personal estate, and of the said tally and order, the Plaintiffs expected that they would have applied the same according to the testator's will; but the Defendants, by contrivance together, pretend that the said will cannot be performed, in regard by an agreement made by the testator on his marriage with the Defendant, *Margaret*, he did agree to leave her one full moiety of his estate, and that the said will cannot bind the said Defendant, *Margaret*, or exclude her from the benefit of the said marriage agreement, whereas if any such agreement was made, the same was voluntary, and subsequent to the testator's marriage, and unfairly obtained; and, therefore, that the Defendants, the executors, may deliver to the Plaintiffs, *E. Webster* and *J. Richardson*, the aforesaid tally and order, and to have a discovery, and an account of the said testator's personal estate, and that the same may be applied according to the directions of the said will, and to be relieved in the premises, is the scope of the Plaintiff's bill. Whereunto it was insisted, by the Defendant's counsel, that the Defendant, *Margaret Mitford*, by her answer says, she believes that the said *Michael Mitford*, her late husband, was, at the time of his death, possessed of a plentiful personal estate, and that before his death, he made his will in writing, to the effect in the bill set forth, but insists that the said will ought not in anywise to affect this Defendant, for that before her inter-

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marriage with the said testator, viz. in or about the 6th of *December* 1686, the testator did enter into an agreement by deed-poll, whereby, in consideration of the intended marriage with this Defendant, and of her marriage portion, he did covenant and agree with this Defendant, and with *P. W.* and *J. O.*, that he the said *Michael Mitford* should and would, in and by his last will and testament, or by good and sufficient assurances and conveyances in the law, or otherwise, before his death, (if this Defendant should him survive), give, grant, convey, assure, and leave, for the use of the Defendant, the one full and clear moiety or half part, of all his estate, in lands, houses, hereditaments, goods, chattels, money, and estate whatsoever, as he the said *Michael Mitford*, or any other person or persons whatsoever, for him or to his use, should stand or be seised or possessed by any ways or means whatsoever, and that in such ample and beneficial manner, as that this Defendant, her heirs, executors, administrators, or assigns, at all times after the death of the said *Michael Mitford*, should and might quietly hold and enjoy and dispose of the same as her and their own proper estate, without any let or molestation whatsoever; and saith, that the said deed-poll, or marriage agreement, was precedent to the said marriage, and in consideration of a marriage portion, and to the intent, as is expressed, in and by the said marriage settlement; and therefore she hopes she shall not be compelled to accept the provision made her by the will, or be excluded from the benefit of the said marriage agreement; and saith, that she is willing to come to a fair account with the Plaintiffs, touching her late husband's personal estate, and is willing that the same shall be applied according to his will; deducting first a moiety, according to the said marriage agreement; and that the said will should be performed as to the other moiety as far as may be, and the Plaintiffs have the benefit thereof. And the Defendants, *Mertins* and *Nisbett*, by their answer do say, that they believe that the said *Michael Mitford* did make his will as in the bill is set forth, and appoint these Defendants, and the Defendant, *William Mitford*, executors thereof, and that the said Defendant, *William Mitford*, the other executor, being at the time of the testator's death in the North of *England*, at a great distance from *London*, these Defendants did therefore prove the said will without him, and did possess

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themselves of such part of the testator's personal estate as they could come by, and they have defrayed the charges of the testator's funeral, and paid several debts owing by the said testator; and say, that in a schedule annexed to their answer, they have set forth a true account of the goods, chattels, and personal estate of the said testator, which has any way come to their hands, as also an account of what debts they have paid, and what debts are still owing by the testator, and likewise an account of the funeral charges; and that among the debts owing they have inserted a bond entered into by the testator to her majesty, of 2000*l.* penalty, conditioned for Mr. *C. C.*, faithfully demeaning himself in his employment of commissioner of prizes at *Leghorn;* and these Defendants do insist to retain so much of the testator's assets in their hands, as shall be sufficent to answer that demand, in case the crown shall have occasion to resort to them for the same, or otherwise, that these Defendants may be effectually indemnified against the said demand, as also against another bond of 300*l.* penalty to *M. C.*, and say that they were willing to have performed the said will, as far as was in their power; but the Defendant, *Margaret Mitford*, has produced and does insist on her marriage agreement in her answer before set forth, whereby she claims a moiety of the said testator's estate, wherefore these Defendants crave the direction and judgment of this Court touching the construction of the said will, and the application of the said testator's personal estate; and these Defendants believe, that the said testator did pay into the Exchequer, as a contribution, 208*l.* 6*s.* 8*d.*, upon security of the act of parliament in the bill mentioned, and that he had an order and tally for receiving 25*l.* per annum during the lives of the Plaintiffs, *E. Webster* and *J. Richardson*, as nominees for the testator, which said tally and order are in these Defendants' custody, and that the said testator did execute such deed-poll, concerning the said annuity as in the bill is set forth, and that therefore these Defendants submit to the judgment of this Court, whether the Plaintiffs, *E. Webster* and *J. Richardson*, are become entitled in their own right to the said annuity, or whether the same is to be esteemed part of the said testator's estate. And the Defendant, *William Mitford*, by his answer says, that being named one of the executors of the said *Michael Mitford's* will, he

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has proved the said will, and intends to act as an executor so far as to see the said will performed, according to the directions and true meaning thereof, and pursuant to the trust reposed in him, for the benefit of all parties concerned therein, but says that he has not hitherto, at any time possessed himself of any part of the said testator's personal estate, or of any of the rents or profits of the real estate, or any way intermeddled therewith, otherwise than by proving the will as aforesaid, and that he is ready to do as this Court shall direct, being indemnified by the decree of this Court. Whereupon, and upon reading the will of the said testator, *Michael Mitford*, the agreement or deed-poll made by the said testator before his marriage with the Defendant, *Margaret Mitford*, dated the 6th of *December* 1686, and the deed executed by the said testator concerning the annuity of 25*l.* *per annum* issuing out of the Exchequer, as also the proofs taken in this cause, and hearing what was alleged by the counsel for all the said parties, this Court declared, that inasmuch as the Defendant, *Margaret Mitford*, has renounced all benefit by the testator's will, and does insist upon the agreement or articles made by the said testator, before and in consideration of his marriage with her, the said Defendant, *Margaret Mitford*, ought to have one full moiety of the said testator's estate, after his debts and funeral charges, and the 50*l.* to the parish of *Clapham* hereafter mentioned, paid according to the said agreement, and doth therefore order and decree, that it be referred to *Samuel Kerk*, esq., to take an account of the estate whereof the said testator, *Michael Mitford*, died seised or possessed, and that the Defendants, the executors do severally account before the said Master for what thereof has in any way come to their respective hands or possession, or to the hands or possession of any other person or persons, to or for their or either of their use, or in trust for them, to their knowledge, by their procurement or with their privity; in the taking of which account, the said Master is to make to the said executors all just allowances; and the said Defendants the executors, and also the Defendant, *Margaret Mitford*, the widow, are to be examined upon interrogatories before the said Master, for the better discovery thereof, and of other the personal estate of the said testator; in the taking of which account, the said Master is

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to make unto the said other Defendant all just allowances; and the said Defendant, *William Mitford*, one of the said executors, is to have notice from time to time, to the end that he may attend the Master upon the said account, if he shall think fit, and this Court now declared that the two annuities of 100*l.* and 25*l.* *per annum*, issuing out of the exchequer, are to be looked upon and taken as part of the said testator's personal estate, and are to be brought into the account thereof; and the said Master is to examine and certify what the said testator's debts and funeral charges, with the legacy to *Clapham* parish, do amount unto, and to make a deduction thereof, and what the said testator's whole estate (after a deduction of the said debts, and legacies, and funeral charges) shall amount unto, it is ordered and decreed, that the Defendant, *Margaret Mitford*, shall receive and enjoy one full moiety thereof according to the said marriage agreement; and in case the said Defendant, *Margaret Mitford*, should desire to have any part of the said personal estate, which was specifically devised to her by the will, she is to have the same at the appraised value in part of her said moiety; and as to the other moiety, it is ordered and decreed, that 4000*l.* thereof, or so much as the other moiety shall amount to of such 4000*l.*, be laid out by the Defendants, the executors, and trustees in the purchase of lands, to be settled according to the uses and limitations in the will in all respects, which purchase is to be approved of by the said Master; and the said executors are hereby indemnified in the making thereof, except as to that part of the said 4000*l.* to be laid out by the said will, which by the said will was to be enjoyed by the Defendant, *Margaret Mitford*, for her life; and in case the moiety of the said testator's estate (which the said testator had power to dispose of by will) shall not be sufficient to answer and make good the said 4000*l.*, then the several legatees in the will, whose legacies are above 10*l.*, are to defalke in proportion out of their respective legacies to make up the said 4000*l.*, but there is to be no defalcation out of any legacy of the value of 10*l.* or under already paid, or hereafter to be paid; and as to such part of the profits and benefit of the said 4000*l.* which by the said will was intended for the Defendant, *Margaret Mitford*, during her life, it is ordered and decreed, that the same do go and be applied during the said Defendant, *Margaret's*

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garet's life, towards making good to the several legatees what shall be so defalked out of their legacies for the making up the said 4000*l.*; and as to the 2000*l.* bond entered into by the testator to the crown upon the account and as security for *C. C.* in the pleadings named, it is ordered and decreed, that the Defendant, *Margaret Mitford*, do give security to be approved by the said Master to indemnify the defendants, the executors, as to one moiety of the said bond or demand; and that the Plaintiffs, *E. Webster*, *J. Richardson*, *Mary Harrison*, and *Winifred Webster* do give security also to be approved of by the said Master, to indemnify the said Defendants, the executors, as to the other moiety thereof; the said securities are to be also against any dormant debts of the said testator; and it is hereby referred to the said Master to approve and take the security so to be given for the said parties; and as to the 50*l.* legacy given by the will to the parish where the testator died, it is ordered and decreed, that the same be paid out of the said testator's personal estate unto the minister and churchwardens of the parish of *Clapham*, to be by them laid out in the purchase of lands for the uses and purposes directed by the said will; and it is further ordered, that the Master do tax all parties their costs of this suit which are to be paid to them respectively out of the estate in question, as also the costs of the said account; and for what the executors shall act or do in pursuance of this decree they are hereby indemnified. 22d *June* 1708. Reg. Lib. B. 1707. fol. 352.

DIXON *v.* SMITH.

March 19.

Under a sequestration, the landlord is entitled to be paid arrears of rent.

THE Defendant, *Smith*, occupied a farm at *Holbeach* in *Lincolnshire*, as tenant to Sir *Joseph Banks*; and one year's rent, amounting to 55*l.*, became due at *Lady-day* 1816. A sequestration having been issued at the suit of the Plaintiff, the sequestrators, on the 10th of *July* 1816, entered on the farm at *Holbeach*, and took possession of the farming stock and other effects

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effects of *Smith*. On the same day, and a few hours after the sequestration was so executed on the Defendant's effects, the agent of Sir *Joseph Banks* caused a distress to be made on the farm, for the arrears of rent, (amounting, after a deduction of 5*l*. 10*s*. for the landlord's property-tax, to 49*l*. 10*s*.) and a notice in writing, addressed to *Smith* (who was then a prisoner in the fleet) to be affixed on one of the gates of the farm, signifying that such distress had been made; and also delivered to the solicitors for the Plaintiff a notice of the rent due. The sequestrators refusing to pay the rent, proceeded to sell the crops and other effects, and the agistment of all the pasture of the farm until *Lady-day* 1817; and paid into court the money arising from the sale.

A motion was now made in behalf of Sir *Joseph Banks*, that out of the money so produced and standing in the name of the Accountant-general, the sum of 104*l*. 10*s*. might be paid to him, for two years' rent, due at *Lady-day* 1817, or that he might be at liberty to come in before the Master to be examined *pro interesse suo*, in the sequestered money and premises.

Mr. *Heald* in support of the motion.

Before the removal of the goods under a sequestration, the landlord by the equity of the statute of *Anne* (a), is intitled to be paid all arrears, not exceeding one year's rent. His legal remedy by distress he cannot enforce against sequestrators, more than against a receiver.

Mr. *Wetherel*, for the Plaintiff, and Mr. *Owen*, for the Defendant, against the motion.

(a) 8 *Ann. c.* 14.

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It has never yet been decided that, under a sequestration, the landlord is intitled to a year's rent in priority; in other words, that a sequestration is an execution within the statute. On any question of right in property sequestered, the only safe course is an examination of the party before the Master, *pro interesse suo.*

The LORD CHANCELLOR.

In a clear case, the Court will not send parties into the Master's office, merely that they may return with their rights as plain as when they went. The facts are not disputed; and a question of law is more fitly discussed here than before the Master. The order must be made.

"His Lordship doth order that it be referred to Mr. *Cox*, one, &c., to tax the said Sir *Joseph Banks* the costs of this application; and it is ordered, that out of the sum of 1000*l.* cash, remaining in the bank on the credit of this cause, such costs, when taken, be paid to Mr. *D. M.*, his solicitor, and thereout also it is ordered, that the sum of 104*l.* 10*s.* be paid to the Right Honorable Sir *Joseph Banks*, Bart., for two years' rent of the farm and lands in the pleadings mentioned, due at *Lady-day* 1817; and for the purpose aforesaid, the said Accountant-general is to draw on the Bank, &c." Reg. Lib. A. 1817. fol. 936.

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JACKSON v. SEDGWICK.

Stipulations in articles of partnership for an annual settlement of accounts, and for payment to the representatives of a deceased partner, of an allowance in lieu of profits since the last annual account, proportioned to the amount of his share of profits, during two years preceding, are waived in equity by omission through several years to settle annual accounts, and by engaging in business to which the stipulations cannot be applied without injustice; and an injunction was granted to restrain the representatives of a deceased partner from proceeding on a bond given by the surviving partners, for repayment of his share according to the articles, before the settlement of accounts of transactions pending at his decease, on which a loss was subsequently sustained.

BY articles of partnership, dated the 29th of *May* 1809, between *Richard Cookes* (since deceased) *George Lord Jackson*, and *John Milthorpe Maude*, after reciting that *Cookes* and *Jackson* had, for several years, carried on the trade of ship-agents, ship-brokers, and insurance-brokers, as partners, and that it had been agreed that their partnership should be dissolved, and that *Cookes*, *Jackson*, and *Maude*, should enter into partnership, in that business for the term of seven years, to be computed from the 1st of *July* then last, and that their capital should be 10,000*l.*, 6,000*l.* to be brought in by *Cookes*, and 2000*l.* by each of the other parties; and further reciting, that the shares of certain ships, the property of *Cookes* and *Jackson* had been valued at different sums, amounting to 1,140*l.* which was to be considered as so much capital brought into the trade by them, in part of their proportions, and to bear interest from the 1st of *July* then last; the parties covenanted, that they would be co-partners in the business of ship-agents, ship-brokers, and insurance-brokers, and in all things incident thereto, and in all such other business as they should agree upon, for the term of seven years, to be computed from the 1st of *July* then last; that the capital of the partnership should consist of 10,000*l.*, which should remain therein during its continuance, unless *Cookes* should happen to die before its expiration, in which case 4,000*l.* were to be repaid to

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his executors or administrators, in the manner therein-after provided; and that, as *Cookes* had brought in and would continue in the co-partnership, during the continuance thereof, or so long as he should be living, 4,000*l.*, being part of the 6,000*l.* above mentioned, over and above the proportions which *Jackson* and *Maude* had brought in, the joint stock, profits, and effects, should be liable to the re-payment thereof; and in case the same should be deficient, the other parties should make good a proportion thereof out of their private property. The articles then provided, that all losses which should arise by reason of bad debts, fire, or other accidents in carrying on the trade, and all expenses of the co-partnership, should be defrayed as follows; 50*l.* annually by *Cookes*, out of his separate estate, and the residue out of the profits of the trade, or by the parties, in the proportions of three-eighths by *Cookes*, three-eighths by *Jackson*, and two-eighths by *Maude*.

The articles further provided that the parties should, on the 31st *December*, in each year, or as soon after as possible, make up and pass an account in writing of all their dealings and transactions, and make a settlement or balance thereof, so that the true state of the same might appear, and of the profits of the trade, and how much was coming to each of the partners; (the amount of each partner's share of the profits to be carried to his separate account in the partnership books, and there to be at his disposal, and to be drawn out of the trade when he pleased, each partner being intitled to recover interest upon the amount of his capital in the business, before any division of the profits); that the same should be written in three several books, each of which should be subscribed by all the parties; and that such accounts, so passed and subscribed, should not be opened or called in question, but should be binding on all parties, their executors

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executors and administrators, unless some special error, to the amount of 30*l.* or upwards, should appear plainly to have escaped their notice, and should be discovered within three years from the making up such accounts; and in case either of the parties should refuse to attend to take such accounts, and sign the same, for the space of ten days after being required, it should be lawful for the other or others of them to proceed to take such account, and to sign the same, and to call to his or their assistance such other ship-agent, or ship-broker, or policy or insurance-broker, as he or they might choose; and such accounts, if taken and signed by the other party or parties, within thirty days next after the expiration of such ten days, should be final and binding, and not be opened or unravelled by the partner or partners making default, but be considered conclusive against him or them, provided a copy of such account be delivered to, or left with him or them within thirty days, accompanied with an affidavit, that to the best of the knowledge and belief of the party or parties so signing such accounts, they were just and true accounts between the parties.

The articles next provided, that no benefit of survivorship should be taken by any of the parties in case of death; and that if *Cookes* or *Jackson* should die during the continuance of the partnership, their executors and administrators should be entitled to an allowance from the survivors, or from *Maude* alone in case of both their deaths, during the remainder of the partnership term of seven years, of the annual sum of 400*l.*; such allowance being secured in manner therein directed, with respect to the share of the partners or partner dying during the partnership of the joint stock or profits; and *Maude*, his executors or administrators were intitled in a like event, to an annual sum of 300*l.* The articles proceeded to provide,

provide, that in case any of the parties should die with in the partnership term, his executors or administrators should be entitled to receive from the survivors an allowance in lieu of all profits, from the day of the then last actual rest, to the day of such decease, in proportion to the amount of the profits which the party dying should have received, or been intitled to receive, out of the profits of the trade from the commencement of the partnership to the then last rest, in case two full years should not have elapsed from the commencement of the co-partnership; but in case two years should have elapsed prior to such last rest, then in proportion to the profits accruing in respect of such two years immediately preceding such last rest; and that such allowance should be paid within six months to the respective executors or administrators of *Cookes* and *Jackson*, or such of them as should die within the term aforesaid, and should also be secured in the manner therein directed, with respect to the share of a partner dying during the co-partnership in the joint effects.

After a provision for diminishing the annual allowance to the representatives of a deceased partner, in proportion to the deficiency of his capital, the articles declared, that upon the death of any of the parties during the partnership, his share in the joint stock, profits, and effects, up to the 31st *December* immediately preceding his decease, or the value thereof, should be paid or secured to his executors or administrators in manner following: viz., as to 2000*l.*, part thereof, one-third part, with interest at 5 *per cent. per annum*, (to be computed from the expiration of the co-partnership term of seven years,) at the end of six months, one other third part with interest, at the end of twelve months, and the remaining third part, with interest, at the end of eighteen months, ensuing the expiration of the

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co-partnership term; and the surviving party or parties should be intitled to retain the same in the business until such respective times, upon giving the security thereinafter mentioned; and as to all such sums of money, estate, and effects, as should belong to such deceased partner, above the said 2000*l.*, and particularly as to 4000*l.* which *Cookes* had brought in more than *Jackson* and *Maude*, the same respectively should be paid to the executors or administrators of such deceased partner or partners in manner following: viz. one-third part thereof, with interest, from the day of his death, at the expiration of six months; one-third with interest at the expiration of twelve months; and the remaining one-third with interest, at the expiration of eighteen months, from his decease; and the same should be secured to be paid in the same manner as the 2000*l.* and interest, and the annual allowance.

It was finally provided, that on the decease of any of the partners during the partnership, the last rest or balance of account signed by the deceased partner, and the survivor or survivors, should be referred to, and what should then appear to have been the amount of the capital of such deceased partner at such last rest, should be considered as his capital, and should not, under any pretence whatever, be disputed, or called in question; and that in case any of the partners should die during the partnership, and upon or after such decease, his representatives should become intitled under the previous provisions, to the payment of his share of the capital stock and profits, and to the payment of such annual allowance as aforesaid, then for securing the payment of so much money as the full value or share of such deceased partner would amount to, in such capital, stock, and profits, at the time therein mentioned for payment thereof, with interest,

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and also for securing payment of the annual sum therein agreed to be allowed to the executors or administrators of the party so dying, the surviving partner or partners should, within one month after his decease, with one other sufficient surety, become bound to his executors or administrators, in one or more bonds with double penalty, conditioned for payment, to such executors or administrators, of such monies or interest and allowances at the time therein mentioned; and should also become bound to such executors or administrators in one or more bonds of sufficient penalty for indemnifying them from all debts and duties which, at the time of such decease, were jointly owing by the partners, on account of the partnership, and from all actions, suits, and expenses for or about the same, which debts and duties the surviving partners agreed to pay and satisfy in convenient time, and that the executors or administrators of the party so dying, upon the sealing and delivery of such bond, should release to the surviving partner or partners all right and interest in all the estate and effects (other than such debts as were next thereinafter mentioned) and profits of the partnership which, at his death, were due and belonged to the parties on account of the said business; and that in case any of the parties should die during the partnership, all such bad and desperate debts owing to or on account of the business, as should not have been accounted a good estate, and as such included in the yearly account or accounts to be made up and stated as aforesaid, (if any such account should have been stated) should, with all convenient speed, be divided between the surviving partners, and the executors or administrators of the deceased, in proportion to their respective shares in the profits of the business, and thereupon the surviving partners, and the executors and administrators of the deceased, should give to each other and his and their executors and administrators, full

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power to sue for and recover their respective shares of such bad debts.

The partnership commenced on the 1st of *July* 1808, and continued till the death of *Cookes* on the 10th of *January* 1815. At that time the books of the partnership were in arrear; no accounts had ever been signed by the partners, or considered as closed; sketches or drafts of the general dealings of the partnership, and of the profit or loss, had been made for the years from 1808 to 1812, but not until after the expiration of twelve or eighteen months beyond the close of the year to which they respectively refer; but no account, or sketch, or draft of an account, had been made for the years 1813 and 1814.

Previously to the 31st of *December* 1814, the partners had engaged in various adventures by shipment of goods and otherwise, which, at the death of *Cookes*, were depending, and the result of profit or loss unascertained. In some instances a loss was then probable, and had since occurred.

On the 27th of *July* 1815, *Jackson* and *Maude*, together with *E. M.*, as their surety, executed to the executors of *Cookes*, a bond in the penalty of 10,000*l.*, reciting that *Jackson* and *Maude* had paid to the executors the proportion of the annual sum of 400*l.* in the articles stipulated to be paid in case of the death of *Cookes*, and also the sum of 1333*l.* 6*s.* 8*d.* being one-third of 4000*l.* with interest from his death, pursuant to the articles; but that no other payment had then been made to them; that the partnership term of seven years expired on the 1st *July* then instant, and that the accounts of the partnership were not made up and passed upon or after the 31st *December*, in each year, as agreed by the articles,

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so that the true state of the same, and of the profits of the trade, and how much was coming to the representatives of *Cookes* did not, at the time, appear; but that it had been agreed that, in pursuance of the articles of co-partnership, *Jackson* and *Maude*, with *E. M.*, as their security, should execute the bond; with condition to be void, if *Jackson* and *Maude* should pay to the executors the several sums of money at the several times thereinafter mentioned; viz. 666*l.* 13*s.* 4*d.*, being one-third of the 2000*l.*, with interest at 5 *per cent. per annum* to be computed from the 1st *July* then instant, on the 1st of *January* 1816; 666*l.* 13*s.* 4*d.* with like interest, on the 1st *July* 1816; and 666*l.* 13*s.* 4*d.* with like interest, on the 1st of *January* 1817; 1333*l.* 6*s.* 8*d.*, another third part of the sum of 4000*l.*, with interest at the same rate, from the 10th of *January* then last, on the 10th of *January* 1816; and the further sum of 1333*l.* 6*s.* 8*d.* with like interest, on the 10th *July* 1816; and also if *Jackson* and *Maude* should pay to the executors at the times and in the manner stipulated in the articles, and with interest as therein mentioned, all such sums of money as should belong to and be the share of *Cookes*, above the sums of 2000*l.* and 4000*l.*, in the joint stock and effects, and the profits of the trade or otherwise howsoever, by virtue of the stipulations in the articles, and not exceeding, together with the sum of 1333*l.* 6*s.* 8*d.* before mentioned, the sum of 10,000*l.* (to which last-mentioned sum the bond was limited for the purpose of ascertaining the stamp duty thereon); and in case upon settling the accounts of the partnership, it should be found that the representatives of *Cookes* were not intitled to receive so much money as the whole of the sums of 2000*l.* and 4000*l.*, a proportionable abatement should be made from the last of the payments therein conditioned to be made.

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The surviving partners paid to the executors of *Cookes*, on account of this bond, sums amounting to about 3400*l*., and the executors having since commenced an action on the bond, the bill was filed by the surviving partners and their co-obligor in the bond, insisting, that the balance of profit and loss on the co-partnership concern, up to the 31st of *December* 1814, ought to be ascertained by consulting the result of all engagements in which the firm was then embarked, and for which it was responsible; that the losses sustained in consequence of such engagements should be brought into the account between them and the executors; and that after the just deduction, in respect of such losses, *Cookes'* share in the business did not exceed 3000*l*, being less than the sum already paid by the Plaintiffs on account of the bond.

The bill, charging that unless the accounts were taken the Plaintiffs could not prove at the trial that the bond had been satisfied, prayed, an account of the partnership transactions; that the share of *Cookes*, at his death, might be ascertained; an account of all sums paid by the Plaintiffs in respect of his share; that the Defendants might repay what should appear to have been overpaid to them, and might deliver the bond, upon being paid what, if any thing, remained due; and, in the mean time, be restrained from proceeding at law.

The Defendants, by their answer, submitted that according to the true construction of the articles, the accounts of the co-partnership transactions should be settled on or down to the 31st *December* 1814, as the transactions stood on that day, and that such accounts, when so adjusted, should be conclusive on all parties, unless an accidental error to the amount of 30*l*. and up-

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wards should be discovered therein, and that no subsequent transactions, whether of profit or loss, or any subsequent losses or profits of the then depending adventures, should be brought into the account either to the debet or credit of *Cookes*, or of any partner who died before the expiration of the term; and that they ought not to be charged with any part of the loss occasioned by the bankruptcy of persons indebted to the partnership at the death of *Cookes*, and then believed to be solvent.

April 16.

On this day the Plaintiffs moved for an injunction to restrain the Defendants from proceeding in the action on the bond.

Mr. *Hart*, Mr. *Bell*, and Mr. *Collinson* in support of the motion.

Sir *Samuel Romilly*, and Mr. *Roupel*, against the motion.

The LORD CHANCELLOR.

The articles of partnership seem to refer only to the trade of ship-agents and brokers; and it is difficult to apply them to trade of another description. The question will be whether the proceeding *de anno in annum* without settling the accounts, and the engaging in business not contemplated by the articles, are not evidence of the intention of the parties to waive the agreement? Partnership accounts may be taken in various ways; the distinction is, that in the absence of a special agreement, the accounts must be taken in the usual way; but where a special agreement has been made, it must be abided by, provided that the parties have acted on it; if not, I always understood that the articles are read in this court

Partnership articles containing special clauses for taking the accounts, on which the parties have

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not acted, read in equity as if those clauses were expunged.

count as not containing the clauses on which the parties have not acted. There would be no difficulty in applying the articles to the particular business with reference to which they were framed, but if the parties engaged in business in which their application would work injustice, as in importation or exportation, where the returns could not be ascertained at the period limited, then, I say, that these articles, though they contain a general reference to other business, are not such as would have been prepared with relation to that specific business; and that engaging in that business affords a reason for not performing the stipulations. Considering the difficulty of now making up the account, after an interval of four or five years. I cannot, at present, think the executors of the deceased partner entitled to insist on the articles. I will read them; but unless I intimate a change of opinion, the motion must be granted.

April 25.

On this day the Lord Chancellor declared, that after reading the articles of partnership, and the bond, he retained the opinion which he formerly expressed, and granted the injunction.

The order restrained the Defendants from all farther proceedings in the action against the plaintiffs, "until the hearing of this cause, and the farther order of this Court." Reg. Lib. A. 1817, fol. 1387.

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April 16. 18.
July 17.

Articles of partnership having provided, that on dissolution by death, notice, or misconduct, of a partner, the remaining partners should have the option of taking his share at a valuation, payable by yearly instalments in the course of seven years; and that on the bankruptcy or insolvency of a partner, the partnership should be immediately void as to him; by a deed, four years subsequent, the partners declared (after a recital that such was then intention in the articles), that in the event of bankruptcy or insolvency, the same arrangement should be practised as on dissolution by death, notice, or misconduct: one of the partners having become bankrupt within a few months after the execution of the latter deed, his assignees are not bound by it. Whether a provision in articles of partnership, that on the bankruptcy of a partner his share shall be taken by the solvent partners, at a sum to be fixed by valuation, and payable by instalments in a course of years, is not void by the statutes concerning bankrupts. *Quære.*

JOHN *Greenwood*, *Jonas Whitaker*, and *William Ellis*, having agreed to become partners in the business of cotton spinners, by indenture dated the 20th of *October* 1812, covenanted that the partnership should continue for four years from the 30th of *June* preceding (determinable by death, misconduct, or notice); but if not dissolved by the death of any of the partners, or for such misconduct as therein after-mentioned, or if none of the partners should give twelve months' notice in writing, of his intention to terminate it at the expiration of that period, the partnership should not then cease, but should continue until one of the partners should give twelve months previous notice in writing, of his intention to dissolve it; and thereupon, at the expiration of such twelve months, the partnership should cease, as to the partner giving such notice.

The articles of partnership farther provided, that immediately after the determination of the partnership, either by the death of any of the partners, or by notice, or for misconduct as thereinafter mentioned, a final account should be made and settled of the co-partnership, and the property belonging thereto, and all the debts then owing by or on account thereof; and the excess of capital which any partner, or the executors or administrators of any partner, might then have in the partnership, above the share of the other partners, or

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their executors, should be discharged out of the partnership effects; and all the effects (including the real estate) of the co-partnership, should be valued by three indifferent persons, one to be named by each of the partners, or by the executors or administrators of a deceased partner; and in case any of the partners should refuse to join in such nomination, the three referees should be named by the other or others of the partners interested in the valuation; and the determination of the referees (who were empowered to employ, at the expense of the co-partnership estate, competent persons to estimate the value of the respective properties,) should be conclusive as to the value; and upon such valuation being perfected, the surviving or continuing partner or partners, should have the option of purchasing the share of the partner so dying or withdrawing, at the price ascertained by such valuation, and should be allowed two months from the date of the valuation, for making such election; and in case of any difference in judgment between the referees, they, or any two of them, should appoint an umpire, whose judgment should be conclusive; and the determination of the referees, or any two of them, should bind the several partners, their respective executors and administrators, to complete the sale and purchase of the share of every partner so dying or withdrawing, by making and accepting a release and assignment thereof, at the price so ascertained; but such partners or partner, continuing to carry on the trade, and becoming the purchasers or purchaser of the share of the partner dying or withdrawing, should be allowed the term of seven years for the payment of the price or purchase-money thereof, by equal yearly instalments, with interest for the purchase-money, or the unpaid part thereof, from the determination of the partnership until payment of the instalments respectively; and the purchase-money and interest should be

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effectually secured by a mortgage of the share so sold, and such bond or further assurance, as by such retiring partner, or the executors of such deceased partner, should be reasonably required; and in such bond or other assurance, should be inserted a proviso, whereby, if default should be made in payment of any of the instalments for the space of one month, the whole of the purchase-money should become an immediate debt; and if the partners so continuing to carry on the trade, should refuse or neglect for two months from the date of the valuation, to declare their intention of becoming the purchasers of the share of the partner so dying or withdrawing, at such valuation, the parties would, within two months after such refusal or neglect, join in a sale of the entirety of the effects of the partnership, by public auction; and it was declared, that the parties were joint and equal partners, as well in the mills and other effects, as in all profits of the trade, and that they would bear equally all losses.

It was further declared, that if any of the partners should become bankrupt or insolvent, the partnership, with respect to such partner, should be immediately void; and that upon the ceasing of the partnership, a final account in writing should be taken and entered in the co-partnership books, of the property belonging to or employed in the trade, and also of all debts and engagements due from or entered into by the partnership; and true copies of such accounts should be delivered to each of the parties, or their respective heirs, executors, or administrators, the same, and the copies thereof, to be signed by all the partners, testifying their settling and approving thereof; and that thereupon the co-partnership estate and effects should be sold and converted into money; and after payment of the debts and engagements of the partnership, the residue should be

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equally divided between the parties, according to their shares in the co-partnership; but if the monies arising from such sale should not be sufficient to satisfy the debts and engagements, the partners should sustain such deficiency equally.

The partnership continued till the 9th of *November* 1816, when a joint commission of bankruptcy was issued against *Ellis*, and certain persons with whom he was connected in a business distinct from that in which *Greenwood* and *Whitaker* were interested.

The bill filed by the assignees of *Ellis* against *Greenwood* and *Whitaker*, prayed a declaration, that the partnership under the articles of *October* 1812, was determined by the bankruptcy of *Ellis*, and that the Plaintiffs, as his assignees, were entitled to have all the partnership property, as well real as personal, sold; and an account of the particulars of which, at the date of the commission, it consisted, and of the subsequent application or disposition thereof by the Defendant; that the outstanding debts might be collected, and all the partnership accounts liquidated; that the clear surplus of the partnership property, and the proceeds thereof, and of the profits of the concern to the issuing of the commission, might be ascertained, and the share due to the bankrupt's estate paid to the Plaintiffs; and that if it should appear that the Defendants had, since the issuing of the commission, carried on the trade, or used the partnership property for their own benefit, they might be compelled to account to the Plaintiffs for a moiety of such profits, or interest on the amount of the bankrupt's share from the date of the commission, at the option of the Plaintiffs; and a receiver or manager of the partnership property.

On

On this day the Plaintiffs moved, on affidavit before answer, for a receiver and manager.

The affidavit, in opposition to the motion, stated, that by indenture dated the 3d of *July* 1816, between *Greenwood*, *Whitaker*, and *Ellis*, after reciting the articles of co-partnership, and that the parties conceived they had not thereby (although their original intention was so to do), in the case of bankruptcy or insolvency of any one of the parties, or in those cases followed by notice amounting to a dissolution of the co-partnership, sufficiently provided for the circumstance of any two solvent partners, or any two partners desirous to continue as between themselves the co-partnership, carrying on the same on the terms and conditions annexed to the two cases of a partner dying or withdrawing voluntarily from the co-partnership; and that the parties, being desirous to place every case of a dissolution of the partnership, which should apply to or arise upon the going out, voluntarily or involuntarily, of any one of the partners, on the same footing, should the same happen by death, under a notice of withdrawing, from bankruptcy, insolvency, or for any other reason mentioned in the articles of partnership as causes of dissolution, had agreed to execute the present instrument to give effect to their intention, and for carrying into effect their agreement and meaning; the parties covenanted with each other, that in all cases of a partial dissolution of the co-partnership, wherein one only of the parties should withdraw from the co-partnership concern, or cease to have any interest therein, whether the same should happen with or without his consent in any manner, the same order and method, and none other, should be adopted and pursued, for ascertaining his interest and property in the partnership effects, as is marked out in the original articles of partnership, in the two cases of a partner

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dying, or withdrawing under his own notice for that purpose; and the same period of time, to wit, seven years from the time of such dissolution, by seven equal yearly instalments bearing interest, should be allowed to the continuing partner, for the liquidation of the retiring partner's share and interest in the partnership property, as it might then happen to be, any thing in the recited articles to the contrary notwithstanding; and the parties, in all other respects not thereby altered, ratified and confirmed all the clauses, provisoes, and agreements, contained in the original articles of copartnership.

The affidavit also stated, that the agreement of *July* 1816, was executed without any fraudulent intention; and that in *November* 1817, the Defendants, by a written notice, required the Plaintiffs to join in a settlement of accounts and valuation, according to the provisions of the articles of partnership, the Defendants waiving the benefit of the clause entitling them to a delay of seven years for the payment of the bankrupt's share, and offering payment on the settlement of the accounts; and *Ellis* deposed, that at the time of the execution of the agreement of *July* 1816, he had not committed, or contemplated the commission of, an act of bankruptcy, nor entertained any doubt of his own solvency, or of the solvency of any partnership in which he was en-

The affidavit of one of the assignees of *Ellis*, in support of the motion, stated his belief that the agreement of *July* 1816, was executed when *Ellis* was insolvent, and in contemplation of bankruptcy; and that *Ellis*, in his final examination, did not disclose that deed.

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Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Horne*, in support of the motion.

The provision by the second deed of *July* 1816, for the event of bankruptcy is void, and the partnership being dissolved by the bankruptcy of *Ellis*, his assignees are entitled to a sale of the partnership effects, and in the mean time to the appointment of a receiver. The stipulation for transferring the share of the bankrupt to his solvent partners, at a price fixed by valuation, and payable in the course of seven years, is contrary to the policy of the bankrupt laws. No man can effectually contract for a disposition of his property, in an event which deprives him of all disposing power. An absolute owner may undoubtedly annex to a gift terms at his discretion; he may direct, as in *Dommett* v. *Bedford* (a), that the enjoyment shall continue during the solvency, and cease on the bankruptcy of his donee; but has it ever been decided that he could by contract control the disposition of his property in the event of his own bankruptcy? On the contrary, in questions arising on marriage settlements, providing that a benefit secured to the husband shall cease on his bankruptcy, a distinction has constantly prevailed; and validity is given to that provision to the extent only of the property of the wife: In the matter of *Meaghan*. (b)

The particular circumstances of the case render it unnecessary to decide the general question. The deed of *July* 1816, proceeding on a misrepresentation of the original articles, was evidently framed in expectation of the approaching bankruptcy, and with the design of withdrawing the property of *Ellis* from the claims of his creditors, under the operation of the bankrupt laws.

(a) 3 *Ves.* 149. See the case at law, 6 *T. R.* 684.
(b) 1 *Schoal. & Lefr.* 179.

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The articles expressly provide, that on the bankruptcy of a partner, his share shall be sold; the subsequent deed extending to the case of bankruptcy, the provision made for the death or retirement of a solvent partner, instead of executing, contradicts, the original intention of the parties, and is an expedient to prevent the legal consequences of an event which they anticipated. That fraudulent contrivance cannot be rendered valid, by the waiver of the stipulation allowing seven years for the payment of the estimated price. It is not competent to a party to abandon one term of an agreement as unreasonable, and insist on the execution of the rest.

Mr. *Hart* and Mr. *Shadwell* against the motion.

The present application seeks, without any allegation of misconduct, to withdraw from the management of the solvent partners the whole affairs of the partnership, their own shares, as well as the share of the bankrupt. The claim of the Defendants involves not the question, whether a trader can be permitted to protect, for a course of years, his interest from the operation of the bankrupt laws; they offer to pay to the assignees the amount of *Ellis*'s share, as soon as it is ascertained by valuation. The second deed declares the intention of the parties, insufficiently and erroneously expressed in the first. In what respect is the policy of law contravened by that stipulation? On bankruptcy, the property of the bankrupt devolves unquestionably to his assignees, but devolves subject to the anterior contracts which he has imposed on it. A trader may so involve his estate, as to exclude his assignees from the immediate enjoyment. For a present debt, he may accept securities payable at remote periods; he may embark in protracted and ruinous speculations; may he not, if engaged in adventures, the abrupt termination of which would be fatal to himself and his partners,

provide for the continued investment of his property, till the accomplishment of the period required by the nature of the undertaking? In the actual event, the effect of such restrictions may be prejudicial to the creditors of an individual partner, though beneficial to the partnership; but that prejudice is accidental only, and in other events, the interests which now suffer, would have been protected by the arrangement. It is indisputable, that mere postponement of distribution cannot be represented as a fraud on the bankrupt laws; such a principle would be inconsistent with commerce. In many undertakings, no man could reasonably embark, except under a confidence that the capital invested could not be withdrawn within a definite period: joint adventurers, engaging to work a mine, may justly stipulate that no part of the funds shall be recalled till a time specified; that the bankruptcy of one shall not reduce the solvent partners to the alternative of suspending the adventure, or advancing additional sums from their own funds. The actual engagement, in this instance, is not, perhaps, the most beneficial for the creditors of *Ellis*; but it is evidently less prejudicial than some which he might have contracted, and by which they would have been bound.

If this clause is void against his assignees on bankruptcy, by parity of reason, on *Ellis*'s death insolvent, it must have been void against his executors. The creditors of a testator cannot be objects of less favour, than the assignees of a bankrupt. But it is clear that the contract would have bound all claiming under his will, or under the statute of distribution; is its validity, then, to depend on an extrinsic circumstance, the solvency or insolvency of his estate? Under the commission, *Ellis* may be intitled to a surplus after satisfaction of his debts; would he, or his assignees repre-

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senting him, be intitled to demand his capital in contravention of this agreement?

But the general question is not raised on this application; after the acquiescence of the assignees, permitting the solvent partners to continue the trade since the bankruptcy of *Ellis* in *November* 1816, the Court will not grant the summary relief prayed. The motion proceeds on the principle of preventing irreparable injury in the nature of waste; and delay is a fatal objection.

Sir *Samuel Romilly*, in reply.

If the solvent partners admit that they carry on the business for our benefit, as well as their own, the necessity for this motion becomes less urgent; but while the question is, whether they are not intitled to retain the whole property, the Court must grant a receiver. The provisions of this deed are designed for the express purpose of defeating the bankrupt laws; cases of future payment arising from contract, without reference to bankruptcy, have no analogy to a stipulation for repayment of capital by instalments, provided specifically for that event. The second deed is evidently framed in contemplation of the individual bankruptcy which ensued.

The LORD CHANCELLOR.*

When a partnership expires, whether by the death of the parties, or by effluxion of time, without special provision as to the disposition of the property, in all these cases, to which I may add the bankruptcy of a partner, the partnership is considered, in one sense, as determined, but in a sense also as continued, that is, continued till all the affairs are settled (*a*); and as,

(*a*) *Post. p.* 507. *Crawshay v. Maule.*

in

Where some members of a partnership, either in the ordinary course of trade, or in closing the transactions after a dissolution, seek to exclude others from a just share in the management, the Court appoints a receiver.

in the ordinary course of trade, if any of the partners seek to exclude another from taking that part in the concern which he is entitled to take, the Court will grant a receiver; so in the course of winding up the affairs after the determination of the partnership, the Court, if necessary, interposes on the same principle.

In this case, the first question is, Whether, supposing the original deed had provided for the dissolution of the partnership by bankruptcy, as it has provided for the dissolution by other means, that provision would be good? I will not say that it would not; but I have heard nothing to convince me that it would. (*a*) From the original deed, it is clear that the intention of the parties was not, as the Defendants insist, to apply the special provision to the event of dissolution by bankruptcy. After providing for other cases, it expressly declares, that in case of bankruptcy, the concerns are to be wound up in the same way as if no special provision was made. On this agreement, the parties proceed,

(*a*) The following are some of the principal authorities applicable to this point: *Lockyer* v. *Savage*, 2 *Str*. 947. *Roe* v. *Galliers*, 2 *T. R.* 133. *Ex parte Hill*, *Cook's B. L.* 228. 1 *Cox*, 300. *Ex parte Bennet*, *Cooke's B. L.* 229. In the matter of *Murphy*, 1 *Schoal. & Lefr.* 44. *Ex parte Henecy*, *cit. ib.* In the matter of *Meaghan*, 1 *Schoal. & Lefr.* 179. *Dommett* v. *Bedford*, 6 *T. R.* 684. 3 *Ves.* 149. *Ex parte Cooke*, 8 *Ves.* 353. *Ex parte Henton*, 14 *Ves.* 598. *Ex parte Oxley*, 1 *Ball & Beat.* 257. *Higinbotham* v. *Holme*, 19 *Ves.* 88. *Ex parte Vere*, 19 *Ves.* 93. 1 *Rose*, 281. *Ex parte Young*, 1 *Buck.* 179. 3 *Madd.* 124. *Ex parte Hodgson*, 19 *Ves.* 206. And see *Brandon* v. *Robinson*, 18 *Ves.* 429. The general distinction seems to be, that the owner of property may, on alienation, qualify the interest of his alienee, by a condition to take effect on bankruptcy; but cannot, by contract or otherwise, qualify his own interest by a like condition, determining or controling it in the event of his own bankruptcy, to the disappointment or delay of his creditors; the *jus disponendi*, which for the first purpose is absolute, being, in the latter instance, subject to the disposition previously prescribed by law.

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till the execution of another deed, which, in one sense, may be justly said to be made in contemplation of bankruptcy, because it is applicable to the event of bankruptcy alone; but I have no doubt, from the face of it, that it was made, in a strict sense, in contemplation of bankruptcy; for it contains a recital which cannot be believed by any one who looks at the original deed, that the parties to that deed intended the same provision in cases of bankruptcy and insolvency, as in the case of dissolution from other causes. I go farther; the inefficacy of the terms of the agreement as applied to bankruptcy, affords another proof that that application was not designed. In the event of dissolution by misconduct, the parties were to name a valuer, and the property was to be divided; if the partnership was dissolved by the death of a partner, what was to be done? His executors or administrators were to name a valuer. The deed then contemplating bankruptcy and insolvency, the provision for insolvency is sufficient, because, while not yet become a bankrupt, the insolvent retains all capacities of acting; but if he becomes bankrupt, it is impossible to contend that, under this clause, he is to name the persons who are to value the interests of his assignees; and no such authority is given to his assignees, for the word "assigns" is not to be found in the deed.

I have no doubt, therefore, whether, on general principle, or on the construction of the deeds, that the law of this case is, that the partnership was dissolved by bankruptcy; and the property must be divided as in the ordinary event of dissolution without special provision. The consequence is, that the assignees of the bankrupt partner are become, *quoad* his interest, tenants in common with the solvent partner; and the Court must then apply the principle on which it proceeds in all

all cases, where some members of a partnership seek to exclude others from that share to which they are entitled, either in carrying on the concern, or in winding it up, when it becomes necessary to sell the property, with all the advantages relative to good will, &c.

With these observations, I shall, for the present, leave the case, considering it one in which some arrangement among the parties is evidently recommended by the interest of all.

The motion being again mentioned, Mr. *Hart*, objected that, in the absence of imputation of misconduct, or suspicion of insolvency, the appointment of a receiver was not a measure of necessity for the sale of partnership property.

Sir *Samuel Romilly* insisted, that a division of the stock (to which, on the dissolution of the partnership by the bankruptcy, the assignees were entitled), having become impracticable by the continuance of the trade during two years, and the consequent change of stock, a sale was necessary, and would be best conducted by a receiver, the Plaintiffs not objecting to the appointment of the Defendant, *Greenwood*.

The LORD CHANCELLOR.

The property must be sold. *Greenwood* may be appointed receiver; and let the master consider the best mode of sale.

" His Lordship doth declare, that the co-partnership property and effects in the pleadings in this cause mentioned, ought to be sold, and doth order that the

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same be sold to the best purchaser or purchasers that can be got for the same, to be allowed of by Mr. *Courtenay*, one, &c.; and it is ordered, that it be referred to the said Master to approve of a proper mode of selling the same; and it is ordered that the money to arise by such sale be paid into the Bank, with the privity of the Accountant-General of this Court, to be there placed to the credit of this cause, subject to the further order of this Court; and in the mean time, and until such sale be had, it is ordered, that the Defendant, *John Greenwood*, be appointed receiver and manager of the said co-partnership property and effects, and take and have the superintendence and carrying on the said co-partnership trade, and get in the outstanding debts and effects belonging to the said co-partnership, and be allowed all his just and reasonable costs, charges, and expenses, in and about the same, but without any salary for his trouble; but the said Defendant is first to give security to be allowed of by the said Master, and to be taken before a master extraordinary in the country, if there shall be occasion, duly to manage the said co-partnership trade, and to be answerable for what he shall so receive in respect thereof, and pay the same as this Court has hereby directed, or shall hereafter direct; and it is ordered, that the said Master do take an account of the co-partnership dealings and transactions; and in taking such accounts, it is ordered that the said Master do inquire and distinguish what capital each of the partners had in the trade at the time of the bankruptcy, and which of the co-partnership debts have been since paid, and by whom, and out of what fund, without prejudice to any question between the parties, and with liberty for either party to apply specially as to the same; and the said Master is to be at liberty to make one or more separate report or reports as to any of the said inquiries, at the request of either party; and it is

ordered,

ordered, that the Plaintiffs, and the Defendant, *Jonas Whitaker*, do deliver over to the said Defendant, *John Greenwood*, all the stock, goods, effects, books, and accounts belonging to the said co-partnership; and the said Defendant, *John Greenwood*, is to be at liberty to bring actions, with the approbation of the said Master, as there shall be occasion, for the recovery of such of the debts as are now due, or shall hereafter become due, in the names of the parties, or any of them, and the persons in whose names such actions shall be brought are to be indemnified against the costs and damages thereof, out of the stock, goods, and effects of the said co-partnership; and it is ordered, that the said Master do settle the said indemnity; and it is ordered, that the said Defendant, *John Greenwood*, do pay the balances reported due from him into the Bank, with the privity of the Accountant-General, to be there placed to the credit of this cause, subject to the further order of this Court;" with the usual directions for taking the account, and liberty to apply. Reg. Lib. B. 1817. fol. 1729.

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ROLLS.
June 8. 11.

R. G. having died intestate, possessed of considerable personal property, and entitled, after the death of his wife, to the principal of certain bank stock, standing in the name of a trustee, his brother, by letter, expressed his intention of relinquishing his share of the intestate's estate to the widow, executed to the trustee (transferring to the widow) a release of the bank stock, and directed the preparation of a release of the general personal estate, the execution of which was prevented by his death, but his wish to execute it continued to his last hour: the release of the stock is effectual in favour of the intestate's widow; but the intention to relinquish the share of the general personal estate not being perfected, amounts not to a gift; and she, as administratrix, must account to the representatives of the brother, but without interest.

ROBERT GOODWIN having died intestate, without issue, on the 12th of *December*, 1808, his personal estate became divisible, one half to his widow, *Elizabeth*

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Goodwin, one-fourth to his brother, *Henry Goodwin*, and the remaining fourth among his nephews and nieces, *Thomas*, *John*, and *Mary Ann*, *Kington*, and *Susannah Bayly*. On the 20th of *December*, 1808, *Henry Goodwin* addressed, to the widow and administratrix of the deceased, a letter, containing expressions of regret that his brother had not made a will; and concluding with these words:—"I cannot think that the law will give the *Kingtons* any thing; let that be how it may, my share I shall relinquish to you, and for your benefit only." *Henry Goodwin*'s share of the intestate's personal estate, amounted to about 2,700*l.*; consisting of 1192*l.* in cash, and one-fourth part of 9,073*l.* 14*s.* 6*d.* 3 *per cent.* annuities, to the capital of which the intestate was entitled, under the will of *Henry Mugleworth*, subject to the life interest of his widow in the dividends.

By a release, dated the 1st of *March* 1809, between *Elizabeth Goodwin*, as the widow and administratrix of the intestate, of the first part, *Henry Goodwin*, *Thomas*, *John*, and *Mary Ann*, *Kington*, and *Susannah Bayly*, as his only next of kin, living at his decease, of the second part, and *Francis Morgan*, as the surviving trustee under the will of *Henry Mugleworth*, of the third part, after reciting, that by that will, *Elizabeth Goodwin* was entitled to the dividends of 9073*l.* 14*s.* 6*d.* stock, during her life, and that *Robert Goodwin* having made no will, the capital of the stock was, after her decease, to be paid to his representatives; and that she, as his administratrix, had, with the consent of *Henry Goodwin*, *Thomas*, *John*, and *Mary Ann*, *Kington*, and *Susannah Bayly*, as the next of kin of the intestate, requested *Morgan* immediately to transfer the said 9073*l.* 14*s.* 6*d.* stock to her; which he consented to do, upon receiving such release and indemnity as thereinafter mentioned; and that he had accordingly, with the approbation of the next of kin, executed

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a power of attorney, authorising a transfer of the stock to *Elizabeth Goodwin*; in consideration of the premises, *Elizabeth Goodwin*, *Henry Goodwin*, *Thomas*, *John*, and *Mary Ann*, *Kington*, and *Susannah Bayly*, according to their several rights and interests, released and discharged *Morgan*, his heirs, executors, &c. and also the heirs, executors, &c. of his deceased co-trustees, from the 9073*l.* 14*s.* 6*d.* stock, and all the interest, dividends, and profits, to the date of the indenture, and from all actions, &c. which they, or any of them had, or might have, against *Morgan*, his heirs, executors, &c. or the heirs, executors, &c. of his deceased co-trustees, by reason of the stock; and the parties of the first and second parts covenanted with *Morgan*, to indemnify him, his heirs, executors, &c. against all actions, suits, &c. by reason of the transfer to *Elizabeth Goodwin*.

For the purpose of securing to *Thomas*, *John*, and *Mary Ann*, *Kington*, and *Susannah Bayly*, their shares of the stock, *Elizabeth Goodwin* executed to them a bond, in the penalty of 5000*l.* conditioned to be void, if her heirs, executors, &c. should, within three months after her decease, transfer to them their heirs, executors, &c. the sum of 2268*l.* 8*s.* 7½*d.* 3 *per cent.* stock; but she was never required to make any such arrangement with *Henry Goodwin* for the payment of his share.

On the 14th of *March* 1809, the solicitor of the administratrix, in consequence of the letter of the 20th of *December* 1808, forwarded to *Henry Goodwin*, for his signature, a printed discharge, for his distributive share, in the form prescribed by statute (*a*), acknowledging the receipt of 2649*l.* after deduction of the duty. On the 21st of the same month, *Henry Goodwin* sent this dis-

(*a*) 36 *G.* 3. *c.* 52. 44 *G.* 3. *c.* 98. 45 *G.* 3. *c.* 28.

charge

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charge to his solicitor, desiring his opinion on the propriety of acknowledging the receipt of money contrary to the fact; and was advised by him that a release, declaring the renunciation of his claim, and explaining his motives, would be more proper. In the beginning of *June*, 1809, a niece of *Henry Goodwin*, by his direction, instructed his solicitor to prepare a deed of release, stating that he had promised to execute such an instrument in favour of the intestate's widow, for the purpose of relinquishing to her his share of the intestate's property. The solicitor accordingly prepared a deed poll, by which, after reciting that by the decease of his late brother, *Robert Goodwin*, intestate, he was intitled to one-fourth, or some other distributive share, of his personal property, and that he had no wish to advantage himself by any unintentional omission of his said brother, *Henry Goodwin* released *Elizabeth Goodwin*, and the estate of his said brother, from the payment of any sum of money, and from the transfer of any property or effects, which might have legally accrued to him by the aforesaid event, and assigned and transferred all such money and property to *Elizabeth Goodwin*, her executors, &c. as her and their goods and chattels. The draft of this instrument was sent to *Henry Goodwin*, and returned by him to his solicitor, with directions to have it copied on stamped paper for execution. Between the beginning of *June* and his death, *Henry Goodwin* frequently expressed an anxious desire to execute the release, and requested the attendance of his solicitor for that purpose, but the execution was prevented, sometimes by his own illness, sometimes by the absence of his apothecary, whom the solicitor had recommended as a proper person to attest it. The 24th of *June* 1809 being fixed for the execution, about eight or nine o'clock in the morning of the 23d. *Henry Goodwin* expressed a hope that he should be able to receive the parties on the next day, and sign the

the release to Mrs. *Goodwin*, "for he very much wished it done;" but within an hour after using those expressions, he expired.

The bill was filed by the executors and executrix of *Henry Goodwin*, against the widow and administratrix of *Robert Goodwin*, claiming one-fourth of the personal estate of the intestate.

The defendant, by her answer, insisted, that the letter of the 20th *December* 1808, under the circumstances, amounted to an actual release and relinquishment of *Henry Goodwin*'s share of the intestate's effects; and that, by reason of the property to which he was intitled being in the hands of the Defendant, and not of a third person, the letter was a sufficient authority for her retaining such share to her own use, without any formal release for that purpose.

Mr. *Bell* and Mr. *Girdlestone*, for the Plaintiffs.

The question in this case is merely legal. At law no action can be sustained for a legacy, or distributive share of an intestate's estate; this Court, therefore, assumes concurrent jurisdiction with the Ecclesiastical Court, in enforcing the legal rights of legatees and next of kin. The demand of the Plaintiffs is founded, not in equity, but in law, and can be resisted only by a strict legal defence. Of the general personal estate, whatever might be the intention of *Henry Goodwin*, no release was ever executed; and the claim of the Plaintiffs, therefore, is in force. *Cotteen* v. *Missing*. (*a*) The release of the stock was made, not to the Defendant, but to *Morgan*, and might be intended, not as a discharge to her, but as an indemnity to him. Taking the stock, as ad-

(*a*) 1 *Madd.* 176.

ministra-

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ministratrix, she took it for the benefit of the next of kin, *Ripley* v. *Waterworth* (b); and the release might probably be occasioned by doubts, whether the trustee would be justified in transferring it to her without their concurrence.

Mr. *Hart* and Mr. *Wingfield* for the Defendant;

Insisted on the avowed intention of *Henry Goodwin*, and on the possession of the Defendant, which could not be disturbed, without the interposition of the Court.

The MASTER *of the* ROLLS.

The bill is filed by the representatives of *Henry Goodwin*, claiming his share of the personal estate of *Robert Goodwin*, his brother. That they are intitled to an account against the administratrix, unless *Henry Goodwin* renounced his right, is not disputed; but it is insisted by the Defendant that his acts amount to a renunciation, and exclude the claim of his representatives. The principal evidence that *Henry Goodwin* relinquished all right to participation in his brother's property is his letter of the 20th of *December* 1808, containing an explicit declaration of his intent. He was affluent—his brother had died in narrow circumstances, leaving a widow to be provided for. By that letter he declares that he shall relinquish his share to her. He lived till the 23d of *June* 1809, when his death happening sooner than was expected, prevented the formal execution of his intention. It appears that he had taken measures for that purpose: a solicitor was employed, and an instrument of discharge drawn, which being objectionable in form, a release was prepared; the execution was first delayed by the absence of the persons proposed to attest it, and by the illness of *Henry Goodwin*, and finally

(b) 7 *Ves.* 425.

pre-

prevented by his death; but he constantly, and within an hour of that event, retained his intention, and expressed a wish to execute it. The question is, whether enough has been done, the intention itself being clear, to enable the Court, which would do its utmost for that purpose, to accomplish it? The demand is, undoubtedly, advanced after much delay, the bill not being filed till eight years from the death of the testator; but the executors have felt it their duty to call for this fund. With every inclination to assist the Defendant, I cannot satisfy myself that the case contains sufficient to constitute a complete gift of the general personal estate.

A gift at law, or in equity, supposes some act to pass the property: in donations *inter vivos*, (not adverting, at present, to donations *mortis causa*,) if the subject is capable of delivery, delivery; if a chose in action, a release, or equivalent instrument; in either case, a transfer of the property, is required.—An intention to give, is not a gift. Without investigating the authorities, it may be sufficient to refer to *Cotteen* v. *Missing* (a), which is not distinguishable from the present case, and where they are all collected. The evidence establishes only a clear intention to relinquish; the testator meant to do a further act, he was preparing to do it; it was not done; the Court cannot supply it. The gift is inchoate and imperfect; not such as can be pleaded at law, or opposed in equity as a bar to a bill for an account by a legatee against the personal representative.

The other part of the case rests on different ground. By the will of *Henry Mugleworth*, the dividends of the stock were given to the intestate and his wife for their

(a) 1 *Madd.* 176. And see *Irons* v. *Smallpiece*, 2 *Barn. & Ald.* 551.

lives,

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lives, and the capital, after the decease of the survivor, to his representatives; on the death of *Robert Goodwin*, his widow became intitled, in her own right, to the interest, and, as his administratrix, to the capital, of that stock, then standing in the name of *Morgan*, the trustee. It is admitted that she did not, as administratrix, take the capital for her own absolute benefit; it is contended only that *Henry Goodwin* released his proportion of the fund; and the question is, whether, as to this property, he has not, by the deed of *March* 1809, executed his intent? That instrument, it is true, is a release, not to the Defendant, but to *Morgan*, the trustee; but the equitable interest, in his proportion of it, subject to the life-estate of the Defendant, was vested in *Henry Goodwin*; by his letter of *December* 1808, he had declared an intention to relinquish this, among the other property, which devolved to him from his brother; the question is, whether he did not execute the release for the purpose of effecting that intent? In terms it is a release to *Morgan*, provided he transfers to Mrs. *Goodwin*. It is not stated that she was to take as administratrix, or to be accountable to *Henry Goodwin*, or to any other person. It may be said, indeed, did the other parties concurring in that release, propose to convey all their interest to Mrs. *Goodwin*, and not to call on her for an account? Did they design to release her? Certainly not; they required from her a bond; expressing the effect of the release, without that precaution, to give to her the beneficial interest; but *Henry Goodwin* took no bond, and as to him, therefore, the deed stands as an absolute release of his interest in the property. The question is, whether his design being declared by letter, and followed by this deed, the Court may not hold that that instrument operates to transfer his equitable right? The decision of the Lord Chancellor in *ex parte Dubost*,

Dubost (*a*), affords a strong analogy in support of the Defendant's claim. Were the case doubtful, the Court would labour to accomplish the unquestionable wish of the testator; but I think that I may, without violence, hold that the release was executed for the purpose of effecting the intent expressed in the letter: that it is a sufficient execution of that intent, and an act which deprives his representatives of all right to call on the administratrix for an account of this stock. To that extent she must be protected.

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The parties not agreeing on the minutes of the decree, the case was again mentioned; the Plaintiffs insisting that the Defendant should be charged with interest on the sum of 1192*l.* 0*s.* 9¾*d.* from the death of the intestate, as a trustee retaining the trust fund.

The MASTER *of the* ROLLS.

On the former occasion nothing passed relative to interest, nor is it an object of the prayer of the bill. Beyond dispute, the testator intended to relinquish this fund in favour of the Defendant, and that intention has been frustrated only by the want of a formal execution of the deed prepared. With his permission, the fund remained in the hands of the Defendant during his life, and a long interval elapsed before his executors asserted their claim. This, therefore, is not a case of wrongful retainer, or refusal to account, but of general acquiescence by the parties intitled. I am clearly of opinion that the Defendant cannot be charged with interest.

(*a*) 18 *Ves.* 140.

His

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"His Honor doth declare, that the Plaintiffs, as the surviving executors and executrix of *Henry Goodwin*, deceased, the testator in the pleadings named, are intitled to one-fourth part or share of the personal estate and effects of *Robert Goodwin*, the intestate in the pleadings also named, possessed by the Defendant, and it being alleged and admitted by the Counsel on both sides, that such share amounts to the clear sum of 1192*l.* 0*s.* 9¾*d.*, and the Defendant, by her Counsel, admitting assets of the said *Robert Goodwin* for the payment thereof, His Honor doth order and decree, that the said sum of 1192*l.* 0*s.* 9¾*d.* be paid by the said Defendant to the said Plaintiffs, or either of them, in full of such fourth part of the said intestate's effects, and to which the said plaintiffs became intitled in right of the said testator, *Henry Goodwin*; and His Honor doth declare, that the said Plaintiffs, as such executors and executrix, as aforesaid, are not intitled to any part or share of 9073*l.* 14*s.* 6*d.* 3 *per cent.* Bank Annuities, in the pleadings mentioned, but that the share of the said *Henry Goodwin* therein was absolutely released by the said *Henry Goodwin* to the said Defendant, by the indenture of the 1st of *March* 1809, in the Defendant's answer stated; and His Honor doth also declare, that the said Defendant became intitled thereto as her own exclusive and absolute property, by virtue of the said indenture; and it is ordered, that the Plaintiffs be at liberty to retain their costs of this suit, as between solicitor and client, out of the said sum of 1192*l.* 0*s.* 9¾*d.* as against the estate of the said testator, *Henry Goodwin*; and His Honor doth not think fit to give the Defendant her costs of this suit," &c.—Reg. Lib. A. 1817, fol. 2194.

BETWEEN WILLIAM CRAWSHAY - PLAINTIFF.

AND

GEORGE MAULE, JOHN LLEWELLIN, AND JOSEPH KAYE - - - DEFENDANTS.

AND BETWEEN

GEORGE MAULE, JOHN LLEWELLIN, AND JOSEPH KAYE; AND BENJAMIN HALL, RICHARD CRAWSHAY HALL, HENRY GRANT HALL, CHARLES RANKIN HALL, AND CHARLOTTE HALL, infants by the said GEORGE MAULE, JOHN LLEWELLIN, AND JOSEPH KAYE, their next Friends, PLAINTIFFS.

AND

WILLIAM CRAWSHAY - - DEFENDANT.

June 9, 10. 27. *July* 11, 23. 31.

R. C. being in possession of mines and iron-works, held under leases of unequal duration, by his will bequeathed 25,000*l.* to *B.*, "as a capital for him to become a partner with my executor of one-fourth share in the trade of all those works, so long as the lease endures," with a devise to *H.* and his wife of the residue of his estates, real and personal; by a codicil the testator gave to *W. C.* three-eighths of the concern at the iron-works, "so the partnership will stand at my decease, *W. C.* three-eighths, *H.* three-eighths, *B.* two-eighths." After the testator's death, *W. C.*, *H.*, and *B.*, carried on the works for two years, selling iron manufactured not only from the produce of their mines, but from ore and old iron purchased for the purpose of manufacture and resale. *B.* having then assigned his share to *C.*, the business was carried on in like manner by *C.* and *H.* till the death of the latter; no agreement having ever been entered into for the duration of the partnership.

1. The codicil withdraws the trade from the operation of the residuary clause in the will, and vests three-eighths in *H.* to the exclusion of his wife.

2. The concern is not a mere joint interest in land, but a partnership in trade.

3. The purchase of a leasehold interest as part of a stock in trade, is not evidence of an agreement to contract a partnership commensurate with the duration of the lease.

4. The partnership is dissolved by the death of *H.*

5. In a suit instituted by *W. C.*, praying a sale of the partnership property, the Court, on motion, directed an inquiry whether it would be for the benefit of all parties interested that the works should be sold, or carried on for the purpose of winding up the concern.

BY articles of agreement dated the 31st of *July* 1794, between *Antony Bacon*, and *Richard Crawshay*, *Bacon* agreed to assign to *Crawshay* all his interest in certain lands, and mines of coal, and iron ore, situated at *Cyfarthfa* in the county of *Glamorgan*, (of which he

was

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was then in possession, under three leases for terms of 99 years each, commencing respectively in the years 1763, 1765, and 1768) subject, after the 29th of *September* 1815, to an annual rent of 5000*l.* and a payment of 15*s.* a ton on all pig iron, annually made on the premises, beyond 6400 tons. *Richard Crawshay* accordingly took possession of the premises, and carried on iron works there: and in 1801, intending an extension of the works, and the erection of new furnaces, it was agreed between him and *Bacon*, that the payment of 15*s.* a ton beyond 6400 tons, should cease at 10,700 tons. Disputes having arisen on the subject of that agreement, in 1808, *Richard Crawshay* filed a bill to compel specific performance. The decree pronounced in *March* 1810 directed *Bacon* to execute to *Richard Crawshay* an underlease of the premises, for all the times which he, or the trustees under his marriage settlement, had therein, except the last day, subject to the yearly payments stipulated.

Richard Crawshay being seised and possessed of a considerable real and personal estate, including the iron works at *Cyfarthfa*, and the buildings and machinery thereon, and a leasehold wharf at *Cardiff*, used for shipping iron, by his will dated the 26th of *September* 1809, after giving among other legacies, 100,000*l.* to his son *William Crawshay*, gave to *Joseph Bailey* 25,000*l.* "to be transferred from my account on the ledger to his, intended as a capital for him to become a partner with my executor of one-fourth share in the trade of all those works so long as the lease endures, with the principal and profits therefrom to be his own forever." He then gave to *Benjamin Hall* esq. and his wife, of *Abercarne*, and to their heirs for ever, all the residue of his estate, real and personal, and appointed Mr. *Hall* sole executor. By a codicil, dated the 4th of *May* 1810, the testator gave to his son *William Crawshay*, "three-eighth

shares

shares of my concerns at this iron work, and of the premises at *Cardiff*; so the partnership will stand at my demise, *William Crawshay* three eighths, *Benjamin Hall* three-eighths, *Joseph Bailey* two-eighths."

The testator died on the 27th of *June* 1810; Mr. *Hall* proved his will, and *William Crawshay*, *Hall*, and *Bailey* took possession of the iron works, and carried them on as co-partners in the shares bequeathed to them, under the firm of *Crawshay*, *Hall*, and *Bailey*, but without any articles of co-partnership. In *October* 1812, *William Crawshay* purchased the share of *Bailey* for 30,000*l*., and from that time the works were conducted by *William Crawshay* and *Hall*, till the death of the latter, under the firm of *Crawshay* and *Hall*; no written articles of co-partnership were ever executed or prepared between them; but they verbally agreed that the future capital of the concern should be 160,000*l*., which consisted of an imaginary or estimated value of the whole of the partnership property; (100,000*l*. standing to the credit of *William Crawshay*, in respect of his five-eighth parts, and 60,000*l*. to the credit of Mr. *Hall*, in respect of his three-eighth parts); and that the books should be balanced on the 31st of *March* in each year, and the annual profits drawn out by *William Crawshay* and *Hall*, in proportion to their shares.

No under-lease having been executed in the life of *Crawshay*, by indenture of the 21st of *May* 1814, *Bacon*, and his trustees, in obedience to the decree of 1810, assigned to *Hall*, his executors, &c., all the premises, for the residue of the respective terms, except the last day of each, subject to the annual rent of 5000*l*. and the payment of 15*s*. a ton on all pig iron made yearly on the premises above 6400 tons, and not exceeding 10,700 tons; and by a deed dated the 1st of *June* 1814,

 and

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and indorsed on the assignment, *Hall* declared that he would stand possessed of the premises, as to three-eighth parts, in trust for himself, and as to five-eighth parts, in trust for *William Crawshay*; and *Hall* and *William Crawshay* entered into covenants for payment of their respective proportions of rent, and for mutual indemnity.

By indenture dated the 23d of *May* 1814, *Bacon*, in consideration of 32,500*l.* paid three-eighths by *Hall* and five-eighths by *William Crawshay*, assigned to *Joseph Kaye*, his executors, &c. in trust for *Hall* and *Crawshay*, in the proportion of three-eighths to the former and five-eighths to the latter, the rent of 15*s.* *per* ton on iron, then due or to become due. By another indenture of the same date, *Bacon*, in consideration of 62,500*l.* assigned to *Kaye*, in trust for *William Crawshay*, his reversionary interest in the premises, and the annual rent of 5000*l.*

On the 1st of *June* 1814, *Bailey*, in execution of the agreement of *October* 1812, assigned to *William Crawshay* his share in the partnership property.

On the 31st of *July* 1817, Mr. *Hall* died, leaving four sons, (the eldest of the age of fifteen years), and a daughter. By his will, dated the 8th of the same month, he devised to *George Maule*, *John Llewellin*, and *Joseph Kaye*, all his freehold, copyhold, and leasehold estates, (except trust and mortgage estates, and the estates in which he was interested as a partner with *William Crawshay* at *Cyfarthfa*), in trust, subject to the payment of debts and legacies in aid of his personal estate, for the benefit of his children. He then declared, that if he should have one or more son or sons living at his decease, or born in due time after, but no such son should then have attained the age of 21 years, it should be lawful for his

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his trustees, and the survivors and survivor of them, and the executors, &c. of such survivor, to carry on the iron works, and other mercantile or trading concerns in which he should be concerned at his decease, if they should judge it for the benefit of the persons interested in his property under his will; and that if they should carry them on, then, during such time as his having such a son should be in suspense, it should be lawful for them to cause or permit any part of the stock in trade or effects which should be employed in or belong to the said works or concerns at his decease, to be employed in carrying on the same; and he exempted the stock in trade and effects so to be employed from the payment of his debts, to the extent and in the manner thereinafter mentioned. The testator also declared, that if his son, who first or alone should attain the age of twenty-one years, should be desirous to have the iron works and concerns or any of them continued, and should signify such desire to his trustees, by any writing under his hand, the amount of the stock and effects then employed therein should be valued, and his said son should pay (or secure in manner therein mentioned) to the trustees, the money at which such stock and effects should be estimated. The testator then directed the application to be made by his trustees, of the profits of the iron works during the suspense of his having a son who should attain twenty-one years, and of the amount of the valuation to be paid or secured by his son as before mentioned; and declared that if his iron works and other concerns should be so carried on, and his son, who first or alone should attain the age of twenty-one years, should decline to carry on the same, or to give such security for the stock and effects employed therein, or if while it should be in suspense whether he should have any such son, his trustees should deem it adviseable to discontinue the said iron works and concerns, in either of such

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cases, the iron works and concerns should be discontinued, and the stock and effects employed in the same should be sold and disposed of in such manner as his trustees should judge prudent and reasonable, and the money arising from the sale, and the gains and profits previously arising from the iron works and concerns, should be disposed of in the manner in which he had directed the gains and profits, and the money to be paid or secured by his son, in the event before mentioned, to be paid or applied, or as near thereto as circumstances would admit. The testator then appointed *Maule*, *Llewellin*, and *Kaye*, executors of his will, and guardians and managers of the estate of his children, during their minorities, and he also appointed his executors and his wife guardians of the persons of his children; and he authorised his trustees to employ any persons in the management of the iron work and concerns, at such salary, and to repose in them such trust or authority in conducting the trade, and in the management and disposal of the estate employed, or to be employed, and in the receipt of any debts to be contracted therein, as his trustees should in their discretion think fit.

On the 12th of *August* 1817, *William Crawshay* sent a written notice to the excecutors of *Hall*, that he considered the partnership absolutely dissolved by *Hall's* death, and would not consent to carry on the works in conjunction with his representatives.

The bill in the first cause, filed by *William Crawshay* against the executors of Mr. *Hall*, prayed, a declaration that the partnership between the Plaintiff and *Hall*, in the iron works, and all the trade and business thereof, became absolutely dissolved, or determined, by the death of Mr. *Hall*, or from that period; an account of the

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partnership dealings, from the foot of the last settlement thereof, previous to his death, and payment of the balance, (after satisfaction of the partnership debts) between the Plaintiff and the executors of Mr. *Hall*, according to their respective interests; a sale of all the partnership effects, and a division of the proceeds.

The Defendants, the executors of *Hall*, admitted that no written articles were ever entered into between *William Crawshay* and *Hall*, any such articles, as they believed, being considered unnecessary, inasmuch as the proportions to which the parties were intitled in the leasehold premises, and the leases, sufficiently ascertained their rights and interests as long as the leases endured. They denied that by the death of *Hall*, his interest in the premises and iron-works determined or was in any respect affected, submitting that they were intitled to the premises and iron-works, as tenants in common with *William Crawshay*, for the residue of the terms of years for which they were holden, and to carry on iron-works for the benefit of the family of *Hall*, in the same manner as he carried on the same with *William Crawshay*, and according to the directions of his will, until one of his sons should attain the age of twenty-one years. They stated that the iron-works were absolutely necessary to the beneficial enjoyment of the leasehold premises; and they insisted, that it appeared from his will and codicil to be the intention of *Richard Crawshay*, that his legatees should, for themselves and their representatives and families respectively, have an interest in the leasehold premises and iron-works, commensurate with the terms for which they were holden; that the joint interest which *William Crawshay* and *Hall* had therein, was not an interest in an ordinary trading partnership, but an interest given by *Richard Crawshay* to them, for the benefit of themselves and their respective families, com-

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mensurate with the terms of years for which the leasehold premises were holden; and that therefore no sale of the property ought to be directed by the Court in opposition to the bequest of *Richard Crawshay*, and to the will of *Hall*, whose family would in that event be deprived of the benefits intended and contemplated by him, to be derived from the leasehold premises and iron-works.

The bill in the second cause, filed by the executors and the children of Mr. *Hall* against *William Crawshay*, prayed, a declaration that the executors were entitled to the leasehold premises and iron-works, for three-eighth parts thereof, as tenants in common with *William Crawshay*, (who was entitled to the other five-eighth parts), until one of the sons of *Hall* should attain the age of twenty-one years, and to carry on the iron-works with *William Crawshay*, for the benefit of the family of *Hall*, in the same manner as *Hall* carried on the same, and according to the directions of his will, until one of his sons should attain the age of twenty-one years, and that then such son, if he chose, would be entitled to the said leasehold premises and iron-works, for three-eighth parts thereof, as tenant in common with *William Crawshay*, for the remainder of the said terms of years, and to carry on the iron-works with *William Crawshay* accordingly. The bill also prayed, the consequential accounts and directions.

On this day a motion was made in behalf of *William Crawshay*, that it might be referred to the Master, to consider and approve a proper plan for the sale and disposal of the whole of the co-partnership iron-works, property, estate, and effects, including the good-will of the joint trade, and that the Master might proceed to a sale thereof immediately.

Sir

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Sir *Samuel Romilly*, Mr. *Bell*, Mr. *Horne*, and Mr. *Rigby*, in support of the motion.

The partnership subsisting without any agreement for its continuance during a certain term, was dissolved by the death of Mr. *Hall*. As long as the surviving partner carries on the trade with the original capital, the representatives of the deceased are, according to the doctrine of *Crawshay* v. *Collins* (*a*), entitled to an account of the profits; but it is by no means clear that the surviving partner could render them responsible for a loss; an event of probable occurrence in a business, producing very uncertain returns; highly profitable in some years, and in others proportionately disadvantageous. Mr. *Crawshay*, therefore, insists on his right to a judicial declaration of the dissolution of the partnership. The object of the motion is not to obtain the effect of a hearing; the decree would direct an account as well as a sale. But were the order for a sale decretal, the Court would not, on that objection alone, compel the surviving partner to carry on the trade, during the interval which must elapse before a decree can be obtained, upon the terms of admitting the representatives of the deceased to a participation in the profits, without being entitled to obtain from them contribution for a loss. *Waters* v. *Taylor* (*b*); *Forman* v. *Homfray* (*c*); *Featherstonhaugh* v. *Fenwick*. (*d*)

Sir *Arthur Piggott*, Mr. *Hart*, and Mr. *Winthrop*, against the motion.

The order sought is decretal, and cannot be obtained on motion. The object of Mr. *Crawshay*'s suit is, a judicial declaration of the dissolution of the partnership, and a sale. The Court will not, by this summary

(*a*) 15 *Ves.* 218. So *Featherstonhaugh* v. *Fenwick*, 17 *Ves*, 298.
(*b*) 15 *Ves.* 10. (*c*) 2 *Ves.* & *Beam.* 329.
(*d*) 17 *Ves.* 298.

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proceeding supersede the established rules which protect its suitors and itself, from premature decision.

Were the order in its nature interlocutory, at least it cannot be obtained on this application. The motion though intitled in both causes, can be made only in the first, the object of the second being foreign; and to the first cause, neither the widow or the children of Mr. *Hall* are parties. Under the residuary clause in the late Mr. *Crawshay's* will, Mrs. *Hall* became intitled to the residue, including the iron-works and stock in trade, as joint-tenant with her husband; that interest was not devested by the codicil, and at the death of her husband, the whole devolved on her by survivorship; she is therefore a necessary party; and before the suits can proceed, the posthumous son of Mr. *Hall* born since their institution, must be brought before the Court.

Independently on these preliminary objections, the order cannot be obtained on the merits. First, this is a case, not of partnersnip in trade, but of joint interest in land; each party may apply for a partition, or sell his own share, but cannot compel a sale of the whole. The manufacture of the produce, was merely a mode of enjoyment of the land; not a trade. Next, the leases taken during long terms of years, for the purposes of the partnership, amount, in the absence of express agreement on that subject, to evidence of an intention to continue the partnership during the continuance of the leases. Lastly, it was the manifest intention of the late Mr. *Crawshay*, in the provisions of his will, that the duration of the partnership should be commensurate with the duration of the leases. The legacy of 25,000*l.* to Mr. *Bailey*, is given expressly as a capital for him to become a partner "so long as the lease endures."

The LORD CHANCELLOR.

An important consideration is, whether this business is such as would subject the parties to become bankrupts. The distinction is obvious, and for this purpose material, between a partnership in trade, and a joint-interest in land. As between tenants in common, the Court does not dissolve the tenancy, but leaves each to sell his share; while in cases of partnership in trade, unless under particular circumstances of the trade, the rule is different.

Sir *Samuel Romilly* in reply.

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If, on the death of Mr. *Hall*, his interest in the trade devolved to his widow by survivorship, his executors have no interest, and the second suit is improperly instituted by them. But the objection is untenable. The codicil of the late Mr. *Crawshay* withdrawing the trade from the operation of the residuary clause in his will, disposes of three-eighths in favour of Mr. *Hall* alone, to the exclusion of his wife.

The objection that the children are not parties to the first suit is equally unfounded. They have no fixed interest. Mr. *Hall's* will contains only a contingent bequest in favour of a child who shall attain twenty-one. The motion, however, is made in both causes, and the persons interested under that will are therefore before the Court.

It is clear that the property consists not of a mere joint-interest in land, but of a partnership in trade. The business includes the manufacture of ore purchased from strangers, and is such as subjects the parties to the bankrupt laws. Mr. *Crawshay*, the testator, described it

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as a trade. He gives, not an interest in leasehold property, but a share in a trade, of the capital of which, that leasehold property forms a part. The expression "so long as the lease endures," assigns no definite period. Among the several subsisting leases, to which is the Court to refer those words? The testator evidently employed them only to denote the intention of passing his whole interest in this stock in trade. It is absurd to impute to him the design of imposing on his legatees the obligation of receiving as partners, the representatives of such of them as died or became insolvent; a creditor for example taking out administration. On that construction, under the bankruptcy of one, his assignees being competent to sell his interest, might introduce the purchaser as a new partner, during the continuance of the leases.

The order sought is in strict conformity with practice. The Court, more especially where infants are concerned, takes immediate measures to terminate a trading, which is in effect conducted with the property of others.

The LORD CHANCELLOR.

In a suit instituted for the dissolution of a partnership, it being clear on the bill and answer that some party is intitled to a dissolution, a sale of the partnership property may be directed on motion.

The object of this motion is a sale of the partnership property; and in whatever terms expressed, the Court, if it directs a sale, will so direct it, that the property may be sold in the manner most beneficial for all parties interested. Where a suit is instituted for the dissolution of a partnership, and where it is clear on the bill and answer that all or some of the parties have a right to a dissolution, it is not contrary to the course of practice to direct a sale on motion. The two modes of proceeding for obtaining an immediate order for a sale, either to set down the cause for hearing on bill and answer, or to apply by motion, are the same in effect, though different in form. The reason of that

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If a partnership is actually ended, no person can make any use of the property inconsistent with the purpose of winding up the concern.

practice is, that if one partner has a right to consider the partnership as at an end, it may continue for the purpose of winding up the affairs; but being by death, or notice, or any other mode of determination, actually ended, no person in possession of the property can make any use of it inconsistent with that purpose. (*a*) If any person, therefore, conducts it otherwise, the Court will appoint a manager to wind up the concern (*b*), and will direct inquiries in what manner it can be wound up most beneficially to those interested. The object of this motion, therefore, might be obtained, notwithstanding the objection of form; and the difficulty with regard to parties, might also be remedied by allowing the case to stand over for the bill to be amended; and the question is to be considered on the part of Mr. *Crawshay*, as if the infant children of Mr. *Hall* had applied for a declaration that the partnership is not dissolved.

(*a*) "There are various ways of dissolving a partnership: effluxion of time; the death of one partner; the bankruptcy of one, which operates like death; or a dry naked agreement that the partnership shall be dissolved. In no one of these cases can it be said, that to all intents and purposes the partnership is dissolved; for the connection still remains, until the affairs are wound up. The representatives of a deceased partner, or the assignees of a bankrupt partner, are not strictly partners with the survivor or the solvent partner; but still, in either of those cases, that community of interest remains that is necessary until the affairs are wound up." *Lord Eldon* C. *Ex parte Williams*, 11 *Ves.* 5. And see *Peacock* v. *Peacock*, 16 *Ves.* 57. *Wood* v. *Braddick*, 1 *Taunt.* 104. *Wilson* v. *Greenwood*, *ante*, *p.* 480. Hæres socii, quamvis socius non est, tamen ea quæ per defunctum inchoata sunt, per hæredem explicari debent. *Dig. lib.* 17. *tit.* 2. *l.* 40. Si, vivo Titio, negotia ejus administrare cœpi, intermittere mortuo eo non debeo, nova tamen inchoare necesse mihi non est, vetera explicare ac conservare necessarium est: ut accidit cum alter ex sociis mortuus est; nam quæcunque prioris negotii explicandi causa geruntur, nihilum refert quo tempore consummentur, sed quo tempore inchoarentur. *Dig. lib.* 3. *tit.* 5. *l.* 21. *s.* 2.

(*b*) *Harding* v. *Glover*, 18 *Ves.* 281.

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Where the contract neither expressly nor by reference limits the duration, the partnership may be terminated at a moment's notice by either party.

The general rules of partnership are well settled. Where no term is expressly limited for its duration, and there is nothing in the contract to fix it, the partnership may be terminated at a moment's notice by either party. By that notice the partnership is dissolved, to this extent, that the Court will compel the parties to act as partners, in a partnership existing only for the purpose of winding up the affairs. So death terminates a partnership (a), and notice is no more than notice of the fact that death has terminated it. (b) Without doubt, in the absence of express, there may be an implied, contract, as to the duration of a partnership; but I must contradict all authority, if I say that wherever there is a partnership, the purchase of a leasehold interest of longer or shorter duration, is a circumstance from which it is to be inferred that the partnership shall continue as long as the lease. On that argument, the Court holding, that a lease for seven years is proof of partnership for seven years, and a lease of fourteen of a partnership for fourteen years, must hold, that if the partners purchase a fee simple, there shall be a partnership for ever. It has been repeatedly decided, that interests in lands purchased for the purpose of carrying on trade, are no more than stock in trade. I remember a case in the House of Lords about three years ago (the case of the *Carron* Company), in which the question was much discussed, whether, when partners purchase freehold estate for the purpose of trade, on dissolution that estate must not be considered as personalty, with regard to the representatives of a deceased partner? (c)

(a) "Although the partnership is entered into for a term of years, it is previously dissolved by the death of either of the partners, unless there be express stipulations to the contrary." *Crawford* v. *Hamilton*, 3 *Madd.* 251.

(b) See *Vulliamy* v. *Noble*, 3 *Mer.* 514.

(c) *Post*, p. 521.

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Reason of the doctrine that a partnership is dissolved by death.

The doctrine, that death or notice ends a partnership, has been called unreasonable. It is not necessary to examine that opinion, but much remains to be considered before it can be approved. If men will enter into a partnership, as into a marriage, for better and worse, they must abide by it; but if they enter into it without saying how long it shall endure, they are understood to take that course in the expectation that circumstances may arise in which a dissolution will be the only means of saving them from ruin; and considering what persons death might introduce into the partnership, unless it works a dissolution, there is strong reason for saying that such should be its effect. Is the surviving partner to receive into the partnership at all hazards, the executor or administrator of the deceased, his next of kin, or possibly a creditor taking administration, or whoever claims by representation or assignment from his representative? (*a*).

If

(*a*) The reasoning, on which the doctrines discussed in the text, rest, (derived originally from the principle, that the contract of partnership is founded on a *delectus personæ*,) has received a fuller illustration from the Civilians, than from any authorities in our domestic jurisprudence. According to the Roman law, a partnership was dissolved, by the death of either of the partners. "Solvitur adhuc societas etiam morte socii, quia qui societatem contrahit, certam personam sibi eligit." *Inst. lib.* 3. *t.* 26. *s.* 5., and see to the same effect; *Dig. lib.* 3. *t.* 2. *l.* 6. *s.* 6., *lib.* 17. *t.* 2. *l.* 4.; *l.* 63. *s.* 10. So rigidly was this doctrine enforced, that a stipulation, for admitting the heir of the deceased, into the partnership, was declared void. "Nemo potest societatem hæredi suo sic parare ut ipse hæres socius sit." *Dig. lib.* 17. *t.* 2. *l.* 35. "Idem (Papinianus) respondit societatem non posse ultra mortem

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If Mr. *Crawshay*, the testator and owner of this property, had thought proper, by his will, to declare that his

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mortem porrigi; et ideo nec libertatem de supremis judiciis constringere quis poterit, vel cognatum ulteriorem proximioribus inferre. *Dig. lib.* 17. *t.* 2. *l.* 52. *s.* 9. Adeo morte socii solvitur societas, ut nec ab initio pacisci possimus, ut hæres succedat societati. *Dig. lib.* 17. *t.* 2. *l.* 59. Societas quemadmodum ad hæredes socii non transit, ita nec ad adrogatorem; *ne alioquin invitus quis socius efficiatur* ei cui non vult. *Dig. lib.* 17. *t.* 2. *l.* 65. *s.* 11. Nulla societatis in æternum coitio est. *Dig. lib.* 17. *t.* 2. *l.* 70.

This restraint on the transactions of adults, without any purpose of public policy, is justly censured by *Pothier*. La raison de cette decision, etoit que la société étant un Droit qui est fondé sur l'amitié que les parties ont l'une pour l'autre, sur la confiance réciproque que l'une a dans la fidelité et les bonnes qualités de l'autre, ilétoit contre la nature de la societé, qu'elle pût se contracter avec une personne incertaine et inconnue, et par conséquent avec les héritiers des parties contractantes, qui lors du contrat, étoient des personnes incertaines, l'associé ne pouvant pas meme s'engager à se donner pour héritier une certaine personne. *L.* 52. *s.* 9. *d. tit.* Cette raison ne me parôit pas bien décisive, et je crois qu'elle a plus de subtilité que de solidité; c'est pourquoi, je pense que dans notre droit, quoique réguliérement la société finisse par la mort de l'un des associés, et que son héritier ne lui succede pas aux droits de la société pour l'avenir; néanmoins la convention qu'il y succédera est valable: c'est l'avis de l'ancien Praticien Masner, des associations, 28 *a.* 33. (*Traité du contrat de société, c.* 8. *s.* 3. *p.* 139, 140.)

The doctrine for which *Pothier* contends, though different from that of *Argou* (Institution au droit François, livr. 3. ch. 32. p. 324.), and *Denisart*, (voce société, p. 539.) who adopt the principle of the Digest, is established by the *Code Napoleon*, (*Code civ. art.* 1868.) The law of *England* imposes no restraint on the period of partnership, or the description of persons to whom, on the death of the original partners, the benefit of the contract is reserved, *Stuart* v. *Earl of*

his legatees should continue the partnership as long as the longest of the leases should endure, no person, I agree,

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of Bute, 3 *Ves.* 212., 11 *Ves.* 657., 1 *Dowe* 73.; *Balmain* v. *Shore*, 9 *Ves.* 500; and see *Warner* v. *Cunningham*, 3 *Dowe* 76.; but according to the doctrine of the text, without express stipulation to the contrary, partnership is dissolved by the death of either partner; the contract not subsisting for the benefit of representatives; *Pearce* v. *Chamberlain*, 2 *Ves.* 33.; *Godfrey* v. *Browning*, *ib.* 34., and other authorities cited in the notes to the present case.

When the number of partners exceeded two, the death of one, effected a dissolution among the survivors. Sed et si consensu plurium societas contracta sit, morte unius socii solvitur, etsi plures supersint; nisi in coeunda societate aliter convenerit. *Inst. lib.* 3. *t.* 26. *s.* 5. Morte unius societas dissolvitur, etsi consensu omnium coita sit, plures vero supersint, nisi in coeunda societate aliter convenerit. *Dig. lib.* 17. *t.* 2. *l.* 65. *s.* 9. La raison est, que les qualités personnelles de chacun des associés entrent en considération dans le contrat de société; je ne dois done pas être obligé lorsque l'un de mes associés est mort, a demeurer en société avec les autres, par ce qu'il se peut faire que ce ne soit que par la considération des qualités personnelles de celui qui est mort, que j'ai voulu contracter la société. *Pothier Traité du Contrat de Société*, *c.* 8. *s.* 3. *p.* 141.

A partnership, without express agreement for its continuance, might be dissolved by either party, provided that the renunciation was *bona fide*, and seasonable, (tempestiva). Dissociamur renunciatione, &c. *Dig. lib.* 17. *t.* 2. *l.* 4. Tamdiu societas durat, quamdiu consensus partium integer perseverat. *Cod. lib.* 4. *t.* 37. *l.* 5. Manet autem societas eousque donec in eodem consensu perseveraverint. At cum aliquis renunciaverit societati, solvitur societas. Sed plane si quis callide, in hoc renunciaverit societati, ut obveniens aliquod lucrum solus habeat, veluti si totorum bonorum socius, cum ab aliquo heres esset relictus, in hoc renunciaverit societati, ut hereditatem solus lucrifaceret, cogitur hoc lucrum communicare. *Inst. lib.* 3. *t.* 26. *s.* 5. Labeo autem Posteriorum libris scripsit, si renunciaverit societati unus ex sociis eo tempore quo interfuit socii non dirimi societatem, committere

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I agree, claiming under that will, could enjoy the benefits conferred by it, without submitting to the inconveniences

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mittere eum in pro socio actione; nam si emimus mancipia, inita societate, deinde renuncies mihi eo tempore, quo vendere mancipia non expedit, hoc casu quia deteriorem causam meam facis, teneri te pro socio judicio. Proculus hoc ita verum esse, si societatis non intersit dirimi societatem: semper enim non id quod privatim interest unius ex sociis servari solet, sed quod societati expedit. Hæc ita accipienda sunt, si nihil de hoc in coeunda socicietate convenit. *Dig. lib.* 17. *t.* 2. *l.* 65. *s.* 5., and see *Dig. lib.* 17. *t.* 2. *l.* 14., *l.* 17. *s.* 2., *l.* 65. *s.* 3, 4.

The Editor is not apprised of any direct authorities in the *English* law, on the distinction between reasonable and unreasonable dissolution; but in one instance, the Court of Chancery seems to have assumed jurisdiction to qualify the right of renunciation, by reference to that distinction. "An application was made, some years ago, to the Court of Chancery, for an injunction to inhibit the Defendants from dissolving a commercial partnership; the other side proposed to defer it, as not having had time to answer the affidavits; but it was insisted, that this was in the nature of an injunction to stay waste, and that irreparable damage might ensue. At length the Court deferred it, the Defendants undertaking not to do any thing prejudicial in the meantime. But no doubt arose concerning the general propriety of such an application. *Chavany* against *Van Sommer*, in Chancery *M. T.* 11 *G.* 3.," (3 *Wooddeson, Lect.* 416. *n.*) The register contains the following entry of the original application in this case. *Peter Chavany* Plaintiff, *James Van Sommer*, and Others, Defendants. 14th *November* 1771. "Whereas Mr. Solicitor-General, of counsel with the Plaintiff, this day moved and offered divers reasons unto this Court, that an injunction may issue to restrain the said Defendants, *James Van Sommer*, &c. from dissolving or breaking up the co-partnership, now carrying on between the Plaintiff and the said Defendants, &c.; or from doing any act whatever tending thereto, and also to restrain the said Defendants, &c. from selling or disposing of, or joining in the sale, conveyance, or assignment of the leasehold estates,

veniences which it imposed; but I find nothing to that effect in his will. It might have been plausibly, though I think

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estate, and interest belonging to the said co-partnership, or contracting for the sale thereof, or joining in such contract, in the presence of Mr. *John Cocks* and Mr. *Maddock*, of counsel with the Defendants, who prayed, that the said notice might be saved; whereupon, and upon hearing what was alleged by the counsel on both sides, it is ordered, that the benefit of the notice of the said motion be saved till the last day of this term, the Defendants consenting not to do any thing contrary to what the Plaintiff now prays, in the meantime, and it is further ordered, that the Defendants do file their affidavits two days before." (*Reg. Lib. A.* 1771. *fol.* 6.) The benefit of the notice was afterwards saved till the first general seal ensuing the term, (*Id. fol.* 7.) and on the 25th of *November*, the Defendants obtained an order for time to answer. (*Id. fol.* 147.) The register has been searched to the end of *Trinity* term 1775, without discovering any farther trace of this cause. In another case, the Court qualified the obligation to continue a partnership, by reference to the design of the contract; and directing an inquiry, whether the business could be carried on according to the true intent and meaning of the articles, expressed a determination to dissolve the partnership, if the Master reported in the negative. *Baring* v. *Dix*, 1 *Cox*, 213. *Montagu* on partnership, *v.* i. *p.* 90.; and in *Waters* v. *Taylor*, 2 *Ves. & Beam.* 299, Lord *Eldon* declared a partnership dissolved by the conduct of the parties, rendering it impossible to conduct the undertaking on the terms stipulated. See *Denisart voce Société*, *s.* 12. *p.* 539.

It seems clear, that in general, the Court of Chancery, will compel specific performance of an agreement for a partnership, *Buxton* v. *Lister*, 3 *Atk.* 385., *Anon.* 2 *Ves.* 629.; but Lord *Eldon* is represented to have held, that this doctrine is not applicable to partnerships, which may be immediately dissolved, *Hercy* v. *Birch*, 9 *Ves.* 360. See *Maddock's Princ. & Pract. vol.* i. *p.* 411. 2*d edit.* This distinction, however, must be received, it is presumed, not without qualification. In many such cases, though the

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I think not effectually, contended, that *Bailey* and *Hall* were bound to continue partners as long as they lived; but

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partnership could be immediately dissolved, the performance of the agreement, (like the execution of a lease after the expiration of the term, see *Nesbitt* v. *Meyer*, *ante*. *p*. 226.) might be important, as investing the party with the legal rights, for which he contracted.

The effect of the lunacy of a partner, as a ground for a court of equity to decree a dissolution (for it seems clear, that lunacy does not, like death, *ipso facto* dissolve the partnership) is not yet settled by decision; *Hudleston's* case, *cit.* 2 *Ves.* 34, 35., *Sayer* v. *Bennet*, 1 *Cox*, 107., 1 *Montagu on Partnership*, *notes p.* 16., (in that case, the question was compromised before the trial of the issue; Mr. *Cox's* MSS.); the dictum of Lord *Thurlow* in *Adams* v. *Liardet*, *cit.* 2 *Ves.* & *Beam.* 300. 304. *Waters* v. *Taylor*, 2 *Ves.* & *Beam.* 303, 304. It seems principally a question of circumstances, to be decided by reference to the particular character of the disease, as permanent or temporary, the terms of the contract, and the nature of the undertaking, as imposing on the lunatic, an obligation of active interference, for the performance of which he is disqualified, or reserving to him a right of inspection, by the suspension of which the safety of his estate is hazarded.

The following note of *Hudleston's* case, no report of which has yet appeared in print, is extracted from a manuscript in the possession of Mr. *William Blackburn*, and agrees *verbatim* with the account of that case in Lord *Colchester's* MSS., for access to which, the Editor is indebted to Mr. *Belt.*

WREXHAM v. HUDLESTON. (a)

In Chancery, *Nov.* 25, 1734.

" THE case was, that the Plaintiff and Defendant, and one *Isaac Spiltimber*, in *November* 1716, by articles, entered

(a) *Reg. Lib. B.* 1734. *fol.* 57.

into

but the words cannot be represented as imperative on any other person. The difficulty on the part of those who

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into a partnership in the mercer's trade, for seven years, from *Michaelmas* 1716, with a proviso in the articles, that *Hudleston* might, at any time after the first year, be at liberty to withdraw from the partnership upon the like terms and in like manner, as upon the death of a partner, the executors or administrators of a deceased partner were, by former articles of partnership between one *Reynell* deceased, and the present partners in 1710; and in all other matters, the partnership of 1716, was to be carried on in the same manner as by the agreements in the former articles; by which articles it was agreed, that in case any of the partners died before the expiration of five years, (which was the term they agreed upon) the executors, &c. of the deceased partner, were to take the share of the deceased partner according to the last account stated, which was agreed to be once a-year done, and the surviving partners were to take the whole stock, and pay the executors by instalments at several days and to give bond, &c.

It appeared that in the new partnership, in the year 1720, Plaintiff *Wrexham*, upon losses in the *S. S.*, in *September* in that year, became lunatic, and so continued till *October* 1725. And in *January* 1720, the other partner, *Spiltimber*, died, and thereupon, in *September*, 1721, the widow and executrix of *Spiltimber*, and the brother, wife, and relations of *Wrexham*, make up an account with *Hudleston*, and by deed, agree to dissolve the partnership.

Wrexham, upon his recovery in 1725, went a journeyman to *Hudleston*, and never complained of the account, &c. till filing this bill in 1732, by which he prayed to set aside the account settled in *September* 1721, and to have an account against *Hudleston*, for the partnership, till *Michaelmas* 1723, according to the articles in 1716. Defendant *Hudleston* as to the account of *September* 1721, if there appeared any errors therein, submitted, the same should be rectified. And upon opening the cause, that matter, and every thing else in difference between the Plaintiff and Defendant *Hudleston*, were, by consent, referred to arbitrators,

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who insist that the partnership is to continue as long as the leases, is this, that they cannot insist that it is to con-

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trators, and the only[6] point reserved for the judgment of the Court was, whether Plaintiff should have an account of the two years partnership, from *Michaelmas* 1721, to *Michaelmas* 1723, as against Defendant, *Hudleston*.

And for Defendant it was objected, that by the death of *Spiltimber*, and the lunacy of Plaintiff, and by proviso in the articles, the partnership was determined in 1721, &c.

But Lord *Chancellor* holds, that lunacy does not dissolve the partnership, even as to the party incapacitated, much less as to the rest; and though in partnerships the parties rely upon the mutual skill and assistance of each other, yet that is to be understood subject to the common accidents of life, as lunacy is; and were an incapacity of this kind to determine a partnership, why may not any sickness, or fever, or fit of the gout, &c.? It is true, lunacy is generally of longer continuance, but yet is uncertain, and it may be soon, in some cases, and in others later, removed.

As to the determination of the partnership by the death of *Spiltimber*, His Lordship gave no opinion, whether, in case of a partnership of three or more, and one dies, the whole partnership is dissolved or not; but seemed to incline that it was not, but in the present case held the partnership not dissolved by the death of *Spiltimber*, because, in the first articles to which the second refer, it is provided, that if one of the partners die, the survivor shall take the whole stock, and pay the executors by instalments; which shews the intention that the partnership should survive and continue as to the others. As to the proviso by which Mr. *Hudleston* had liberty to withdraw from the partnership, &c., that is not for dissolving the partnership, and by the accident of Plaintiff's lunacy became impracticable and impossible to be pursued, &c. As to the length of time, and acquiescence since by Plaintiff, &c. there is nothing but silence, and no act done to ratify the transactions during the lunacy, which were certainly null in themselves for want of sufficient authority in the parties transacting. And His Lordship deemed it might seem hard upon *Hudleston*, during the lunacy, to be

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continue between the original partners and their representatives; for they have admitted, and must admit, that

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be at all the hazard, &c. and no profit, &c.; but it often happened so in other cases as of infants, &c. however that it would be reasonable to consider *Hudleston* as to his extraordinary trouble, &c.; but His Lordship declared his judgment, that the partnership accounts ought to be carried on to *Michaelmas* 1723, the time for determining it by the articles; and as to all other matters the account, &c. referred as before to five arbitrators.

Note.—His Lordship mentioned the case of Mr. *Cambridge* a few years ago, who was a lunatic and in partnership, and His Lordship said he thought the partnership there went on during the lunacy.

No books or cases were cited, but by Mr. *Floyer* for Defendant. *Vinn. Com.* on *Justin. Inst. l.* 3. *tit.* 26. *s.* 5. *Domat Loix Civ. l.* 1. *tit.* 8. *s.* 5. and cases put of one partner's becoming bankrupt, or feme partner marrying, to shew by what acts of law partnerships might be dissolved, &c.

As to the point of a partner becoming lunatic, if the partnership is not dissolved, it must continue with all the consequences of partnership, *i. e.* the lunatic must be bound by the debts and contracts of the other partner, which might be greatly to the lunatic's prejudice, especially if he has the greatest share in the stock, &c.; and to say the partnership is to continue as to profit but not to loss, is contrary to the very nature of partnership, which is a sharing in profit and loss, &c. and in fact is impracticable with respect to all strangers and parties dealing with the partnership; because, as to them, the stock of the lunatic will be equally liable, &c. And to the objection that lunacy is an accident, and the act of God, and, therefore, not to prejudice the party, &c. that is true with respect to saving conditions; but yet if one contracts to assist another with stock and service, and in consideration thereof is to have a share of the profits, &c. if by the act of God, as lunacy, &c. he is disabled as to his service, and by law his share of the stock is privileged from any loss or risk, it can never be reasonable or conscionable, that

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that each partner might assign his interest, and assign it to any number of individuals, in any number of shares; so that in truth the partnership, within two years after its formation, might not contain either an original partner, or a representative of any one of the original partners; but might consist entirely of a multitude of assignees.

In another view of this question it becomes important accurately to know the nature of the business. It seems difficult to establish that this is an interest in land, distinct from a partnership in trade; a mere interest in land, in which a partition could take place; for when persons, having purchased such an interest, manufacture and bring to market the produce of the land, as one common fund, to be sold for their common benefit, it may be contended that they have entered into an agreement, which gives to that interest the nature, and subjects it to the doctrines, of a partnership in trade. Such is my present view; but both on the merits and on the objections of form, the case deserves further consideration.

June 27.

The LORD CHANCELLOR.

It may be assumed, though the observation is not material to the purposes of this application, that the de-

that he should nevertheless have a share of the profits made by the others sole service and stock.

This reasoning does not hold where the incapacity is short, or removed soon, but here it was total, and during the whole time to come of the partnership; and the decree seemed the harder in this case because of the great length of time since and after the lunacy removed," &c.

A memorandum in the MS. describes this case, and others which accompany it, as "Cases from Mr. *Floyer*."

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sire of Mr. *Crawshay*, the testator, was to keep the concern together. He gives the sum of 25,000*l.* to Mr. *Bailey*, as a capital for him to become a partner with his executor, Mr. *Hall*; the rest of his interest in the trade, if he had not made a codicil, would have passed by the will to *Hall* and his wife; the effect of the will and codicil combined, is this; by the former, the testator being possessed of the entire concern, bequeathed two-eighths to *Bailey*, the rest, including the three-eighths given by the codicil to *William Crawshay*, would have devolved under the residuary clause to *Hall* and his wife; the codicil, continuing the gift of two-eighths to *Bailey*, disposes of three-eighths to *William Crawshay*, and of the remaining three-eighths to *Hall*, in exclusion, as I understand, of his wife. Such being the state of the concern at the death of the testator, it appears that *Bailey* sold his share to *William Crawshay*, and it has not been disputed in the course of the discussion, that every one of the legatees was at liberty to sell his interest; the consequence is, that the individuals forming the partnership may be changed as often as the partners think proper. The question on these pleadings is, whether, supposing this the hearing of the cause, the Court could order the property to be sold; and whether the nature of the concern, and of the interest of the several parties in it is not such, that each being at liberty to sell his own share, they yet cannot, more particularly by interlocutory application, call on the Court for a sale of the whole? Mr. *Crawshay*, having bought the interest of Mr. *Bailey*, carried on the business jointly with Mr. *Hall*, till the death of the latter. His will seems to me to devolve on his executors the discretion of continuing or discontinuing this concern, as they should think most for the benefit of his family; and he considers himself at liberty (for the will states as much) to introduce three executors as partners with Mr. *Crawshay*, and various

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branches of his family as *cestuis que trust* of those executors, as they must be, if the partnership is continued. It is impossible to contend that Mr. *Hall* may thus impose on Mr. *Crawshay*, the necessity of continuing in partnership with his three executors, and their *cestuis que trust*, without admitting that on the same principle, he might have imposed the obligation of receiving as partner, any person who might now sustain, or hereafter acquire, the character of executor or administrator to any of the trustees, or of their *cestuis que trust*, and that Mr. *Crawshay* might have exercised a similar power. If this case is to be considered subject to the principles which govern partnerships in general, I cannot say that such was the situation of either party.

On the death of Mr. *Hall*, there being no articles of partnership, or agreement for its continuance, without any notice, and for every purpose, except that of winding up the concern, the partnership would cease, unless the surviving partner, and the representatives of the deceased, entered into some agreement for its continuance; and in the absence of articles, or stipulation to the contrary, *Crawshay*, in the life of *Hall*, or *Hall*, in the life of *Crawshay*, might, on the common principles of the contract, by notice, have terminated the partnership. It is contended, that the late Mr. *Crawshay*, having formed this business, must have had an intention to keep it together, as one concern, though he distributed different interests in it among different members of his family; had he so said, without doubt, those who took his bounty, must have taken it on the terms which he imposed; but there is no such expression in his will or codicil, nor is the effect of those instruments more than to give an interest in aliquot shares and proportions in this concern. He has said, indeed, that *Bailey* should have an interest to the amount of 25,000*l.*, and should

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be partner with his executor; but neither the terms nor the intent of the will impose on *Bailey*, or on his executor, an obligation to carry on the partnership, except as between themselves; and if *Bailey* thought proper to sell to *Crawshay* his interest, a question might have arisen, as long as the executor was living, whether *Crawshay*, purchasing the interest of *Bailey*, did not purchase subject to the obligation which, it is said, this will imposes on *Bailey*; but it seems to me impossible to contend, that when the executor was dead, either *Crawshay* or *Bailey* were bound to carry on the trade with the executors of that executor; a proposition which cannot be maintained without asserting that they were bound to carry on the trade with the successive executors of that executor, to the expiration of the leases.

It has also been insisted that the purchase of leases must be considered as evidence of a contract for the continuance of the concern. Unquestionably partners may so purchase leasehold interests as to imply an agreement to continue the partnership as long as the leases endure; but it is equally certain that there is no general rule, that partners purchasing a leasehold interest must be understood to have entered into a contract of partnership commensurate with the duration of the leases. For ordinary purposes a lease is no more than stock in trade, and as part of the stock may be sold; nor would it be material that the estate purchased by a partnership was freehold, if intended only as an article of stock; though, a question might in that case arise on the death of a partner, whether it would pass as real estate, or as stock, personal estate in enjoyment, though freehold in nature and quality. (*a*) It is impossible therefore in my

There is no general rule that partners purchasing a leasehold interest, must be understood to have entered into a contract of partnership commensurate with the duration of the leases.

Whether freehold estates purchased by a commercial

(*a*) See *Thornton* v. *Dixon*, 3 *Bro. C. C.* 199. *Smith* v. *Smith*, 5 *Ves.* 189. *Bell* v. *Phyn*, 7 *Ves.* 453. *Balmain* v. *Shore*, 9 *Ves.*

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partnership as an article of stock, devolve on the death of a partner, as real, or as personal, estate, *Quære.*

my opinion to hold, that there being many leases, some long, some of short duration, and others intermediate, the partnership is to subsist during the term of the leases, or of the longest lease. By the will of Mr. *Hall*, the question, whether his executors and trustees should continue in partnership, is left to their discretion; clear evidence of his opinion, that his interest might be separated from *Crawshay's*; if so, *Crawshay's* might be separated from his; and upon that construction of the will of the late Mr. *Crawshay*, the argument is, that he meant the whole concern to be kept together, but cared not who were to be the partners; an intention not to be imputed to him unless unequivocally expressed in the words of his will.

The question then resolves itself into this, what is the nature of this partnership property? The general doctrine with respect to a trading partnership is, that where there is no agreement for its continuance, any one of the partners may terminate it, and admitting the serious inconveniences which sometimes ensue, it becomes us to recollect the formidable evils which would attend the opposite doctrine; nor is it clear that a better rule could be suggested: but, whatever is its' policy, the principle of law being established, it is incumbent on those who engage in partnership to protect themselves by contract against its inconveniences; if they omit that precaution, Courts of Justice have no right to redeem them from the penalties of their imprudence. With respect to mere joint-interests in land, I apprehend the rule to be different: the parties then becoming tenants in common, each cannot call on his companions to concur

500. *Stuart* v. *Marquess of Bute*, 11 *Ves*, 665, 666. *Selkrig* v. *Davies*, 2 *Dowe*, 242. *Townsend* v. *Devaynes*, 1 *Montagu on Partnership*, *Notes*, *p*, 97. *Ante*, *p*. 508.

in a sale, but must sell his own interest. It is said that this is only the case of tenancy in common of a mine; if so, I think that the doctrine with respect to land would apply, and not the doctrine with respect to trading partnerships; but a very difficult question may arise whether, if the parties, being originally tenants in common of a mine, agree to become jointly interested in the manufacture of its produce for the purpose of sale, they continue mere tenants in common of the mine; still more, if not only carrying the produce of their own mine to market, they become purchasers of other property of a like nature, to be manufactured with their own. On such a case in bankruptcy, it might be a question whether they were purchasers for the mere purpose of better bringing to market the produce of their own mine, or for the purpose also of bringing a distinct subject to market as traders. On the evidence before me the case is left somewhat doubtful, though, I think, that the language of Mr. *Hall's* will, and of all the instruments, describes this as a trading concern; but under the circumstances it will not be wrong to have the nature of the business explained by affidavit. If this is a trading partnership the common principles must be applied.

Then comes the question, Can the Court, in such a case, direct a sale by interlocutory order on motion? I have considered that question much, and I think that the Court not only can, but in many instances does, order a sale on motion, in the instance of a trading partnership actually dissolved. Consider the inconveniencies of a contrary proceeding. By the hypothesis, the Court has before it the case of a trading partnership clearly dissolved, and nothing remains, therefore, but to wind up the concern; we must then weigh the consequences of permitting the business of a partnership, actually

In the instance of a trading partnership actually dissolved, the Court orders a sale on motion.

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actually dissolved, to proceed until a decree for a sale; a decree which, in those circumstances, must necessarily be pronounced. An universal rule, that the trade, whether beneficial or not, should be carried on till the decree, would render the jurisdiction of the Court, in many cases, extremely mischievous; and on general principles, therefore, it is the practice, in the instance of a trading partnership clearly dissolved, at once to put an end to the trade, where that measure is required by the evident interest of the parties.

I shall reserve my final decision till I have seen the affidavit; and it may be worth consideration, whether you will not, in the mean time, bring before the Court, the posthumous child of Mr. *Hall.*

The affidavit of Mr. *Crawshay*, in explanation of the nature of the business, was to the following effect; that the iron-works at *Cyfarthfa* had, from the period of their first establishment by his father, been conducted as a trading concern; that the produce of the mines consisted of iron-stone, coal, and lime-stone; and that, at the works, large quantities of iron (of various specified descriptions) had been, and were manufactured, sometimes from the materials obtained from the leasehold premises in qnestion, and sometimes from pig-iron and finers' metal purchased in *London*, *Plymouth*, and *Bristol*; that from the establishment of the works, the proprietors had been in the habit of making very considerable purchases of iron-ore from *Lancashire*, pig-iron, and finers' metal, and of old wrought iron, naval and ordnance stores, for the purpose of manufacturing the same at the works into various sorts of iron, and re-selling them in that manufactured state; that such purchases, (to a large amount), manufacture, and re-sale, had been made by the

the successive firms of *Crawshay*, *Hall*, and *Bailey*, and *Crawshay* and *Hall*, during those respective partnerships; that the whole of such purchases were made with a view to profit, by manufacturing the same at the works, into bar and other iron for re-sale, and not merely for mixing the same with the iron the produce of the works, for the purpose of improving the iron of the works, or bringing the same better to market; and that from the first establishment of the works, the iron-stone, coal, and lime-stone produced from the mines on the works, had never been sold in their natural or raw state, except a small quantity of coal for the accommodation of the labourers.

The LORD CHANCELLOR.

July 23.

This application, whether granted or refused, is one of the most important with which I have lately had to deal. The motion is made in two causes, to neither of which is the widow of Mr. *Hall* a party. The first bill prays a declaration that the partnership is dissolved; the object of the second is to compel its continuance, omitting to advert to a fact which, in any view of the case, seems clear, that *Crawshay* could not be constrained to remain a partner, but had the same right to dispose of his interest, which was exercised by Mr. *Hall* over his own. I am perfectly satisfied that the relief sought by that bill cannot be given, that is, that the executors of Mr. *Hall* cannot bind *Crawshay* to them; whether he can compel dissolution, is quite another question. Mr. *Hall* having, by his will, disposed of his own share, and attempted to introduce new partners, there is obviously no equity to constrain these parties to continue in partnership, unless it arises from express or implied contract, or from directions in the will under which they all claim. In that will I find no such direction.

It

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It is calculated only to render *Bailey* a partner in the trade, but imposes no conditions on *Crawshay*. On that point, however, it may be sufficient to say, that had any such conditions been imposed, yet when the interests of *Bailey* and *Crawthay* became united in one person, and the executor was dead, having made such a will as appears in these pleadings, it would be impossible to maintain that an obligation existed among the parties, to continue in partnership during the remainder of the leases.

I am also of opinion that, if this is to be considered as a partnership in trade, the utmost that can be made from the purchase of leases of longer or shorter duration, is to propose that as a circumstance of evidence, from which may be inferred an implied contract that the partnership should last as long as those leases; but I find nothing here to authorise the conclusion that such was the intention. The purchase of a lease by a partnership, is no more than the purchase of an article of stock, which, when the partnership is dissolved, must be sold. I lay aside the affidavit as to the nature of the undertaking, because there is sufficient in the wills of *Crawshay* and of *Hall*, to call on the Plaintiffs in the second cause, to shew that this was not a trading partnership, if they meant to insist on that proposition. At present, I think that this was a trade.

The next question is, what is the consequence of Mrs. *Hall* not being a party? It is said that the effect of *Crawshay*'s codicil is not such as to deprive Mrs. *Hall* of her interest under the will. That argument, if correct, might raise a question somewhat difficult; for considering the nature of the property, including freehold, leasehold, and personal chattels, and the power of Mr. *Hall* as her husband, over her interest in many parts

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of that property, by reducing them into possession, unless we hold that the codicil deprived her of all the benefit, which the residuary clause in the will conferred, it would not be easy to know what is become of her interest. Mr. *Hall* has taken on himself by his will to dispose of this property, and has given to his wife a provision which would put her to election, if she retains any interest in it; and should she elect to take against the will, it requires consideration, that she is not a party. The infant also is not before the Court; and some difficulty may arise from acting in their absence. On the other hand, it is impossible to call on *Crawshay* to continue a partner with the executors of *Hall*, and to say that, whether they are considered as having the legal estate only, or as trustees for the family of *Hall*, *Crawshay* is obliged to unite himself with them as a trustee carrying on the trade for the benefit of their *cestuis que trust*; or that he has not at this moment the same right which *Hall* by his will supposed his executors would have at his death, and his eldest son at twenty-one.

That brings it again to the question, whether this is a partnership in trade, or a tenancy in common in land; and, if a partnership in trade, whether the ordinary rule of the Court is, on dissolution by the death of a partner, to wait till a decree before disposing of the partnership property, if the concern is of such a nature that it cannot be wound up at once? I consider it clear, that the general rule is not to wait for a decree; but, at least if the parties differ as to the mode of carrying on the trade, the Court will, without reference to the objection for want of parties, appoint a manager. Whether they will give notice of a motion for that purpose, which they shall be at liberty to do, or call on the Court for its opinion, and a reference to the Master to state the best

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best mode of winding up the concern, is what the parties will determine.

Mr. *Crawshay* says what I think is not unreasonable, that he will not carry on the trade five-eighths for himself, and three-eighths for the benefit of others. I desire to be understood as not deciding against ordering a sale, if Mrs. *Hall* and the infant were before the Court. If Mr. *Crawshay* will not carry on the trade, it is for the benefit of all parties interested, absent as well as present, that a manager should be appointed; and is it clear that the Court possesses the power of making the order on motion, without waiting for a decree.

July 31.

The LORD CHANCELLOR.

The first question that remains to be considered is, whether Mrs. *Hall* has any interest in this fund? How does that stand in the opinion of other persons? First, Mr. *Hall* disposed of the whole interest by his will; and his executors have filed a bill on the supposition that she had no interest; next, if the codicil had not the effect which I imagine, on the will, the nature of the property renders it extremely improbable that Mrs. *Hall* should retain any interest; lastly, I think the codicil a revocation of the will so far as concerns the trade. The question follows, is it clear that the partnership was dissolved by the death of *Hall*, or am I to say that his executors, or any of them, are partners at this day in this concern? After repeated consideration, I entertain no doubt, either that if this is to be regarded as a trading concern, the partnership was ended by his death or that it was a trading concern; the consequence is, that being a trading concern, and the partnership being terminated by *Hall*'s death, *Crawshay* would be justified in dealing with the property, since that event, as a person who is to wind up the con-

cern

cern. That introduces the question, whether I am to place a manager on the estate, or to leave *Crawshay* to deal with the property as surviving partner? In that character he is at liberty to deal with it for the purpose of winding up the concern; it is true that other parties are at liberty to deal with it in the same way, and in the event of differences between them, the Court can only appoint a manager to act under its direction. If application was made for a manager, it would be the duty of the Court, with regard to the infants, to consider whether that appointment is for their benefit, or whether there should be a reference to inquire the expediency of appointing a manager to wind up the business, or ordering a sale. The state of the market varies so much, that a sale, which might be beneficial at one moment and prejudicial at another, cannot be ordered without inquiry. I think that I shall not do wrong in directing a reference to the Master of the vacation to inquire whether it is for the advantage of all parties that this property should be sold, and, if so, on what terms; without prejudice to any question.

"His Lordship doth order, that it be referred to Mr. *Courtenay*, the Master of the vacation, to inquire and state to the Court, whether it will be for the benefit of all parties concerned in the works, that the same should be sold, and in what manner, as going works, or that they should be carried on for the purpose merely of winding up the concern; and for the purpose of making such inquiries, the parties are to be examined upon interrogatories, if the Master should so think fit, and to produce all books, papers, and writings relating to the said works, the production of which the said Master may think it proper to require: and it is ordered, that

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CRAWSHAY *v.* MAULE.

the said Master do proceed *de die in diem.*" 31st *July*, 1818. Reg. Lib. A. 1817. fol. 1760.

By his report, dated 11th *December* 1818, the Master, after stating that it was admitted that it would be highly injurious to all parties interested, to stop the works, or to carry them on merely for the purpose of winding up the concern, or to put them up to sale otherwise than as going works, and that *William Crawshay* had offered to purchase the whole of Mr. *Hall's* share for 90,000*l.*, certified that it would be for the benefit of the infants, and of all other parties concerned in the works, that the whole of the shares and interests in the said leasehold and other estates, &c. vested in the executors of Mr. *Hall*, should be sold to Mr. *Crawshay* at that price. By an order of the Vice Chancellor, on the petition of Mr. *Crawshay*, the report was confirmed, and it was "ordered that the Defendants, *G. Maule*, *J. Llewellyn*, and *J. Kaye*, as executors of the said *B. Hall*, esq., the testator in the pleadings named, be at liberty to sell and dispose of, to the petitioner, by private contract, at the sum of 90,000*l.*, ascertained and apportioned as in the said report specified, all the estate, shares, right, and interest of them the said Defendants, as such executors as aforesaid, of and in the said iron works, and the said late co-partnership of *Crawshay* and *Hall*, and in the leases, farms, lands, and buildings, wharf, machinery, &c." 24th *December*, 1818. Reg. Lib. A. 1818. fol. 204.

END OF THE THIRD PART.

REPORTS

OF

CASES

ARGUED & DETERMINED

IN THE

HIGH COURT OF CHANCERY,

Commencing in the Sittings before

HILARY TERM,

58 Geo. III. 1818.

Ex parte PROCTOR.

(In the matter of John Richard Birch, a lunatic.)

1818. *April* 7.

The committee of the person of a lunatic not removed in consequence of his bankruptcy. On a petition to remove the committee of the person, the Court (not being prevented by the form of the petition from granting relief according to the nature of the case,) directed an inquiry, whether the comfort of the lunatic was sufficiently provided for; regard being had to the sum allowed.

THIS petition prayed the removal of *William Birch*, the committee of the person of the lunatic, on the ground that he had become bankrupt, and that, in the arrangements made, the comfort of the lunatic had not been duly consulted. The evidence on the latter allegation was contradictory.

Mr. *Hart* and Mr. *Wingfield*, in support of the petition, insisted that the committee of the person, having the management of the funds for the maintenance of the lunatic, was in a situation of pecuniary trust; and relied on *Ex-parte Mildmay*. (a)

(a) 3 *Ves.* 2. In *Smith* v. *Bate* (2 *Dick.* 631.), a testamentar guardian having been declared bankrupt, Lord *Thurlow* directed a refer-

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Ex parte PROCTOR.

Sir *Samuel Romilly* for the committee.

Bankruptcy disqualifies for pecuniary, not for personal, trusts. The committee of the person is chosen, not from the circumstances of his fortune, but from connection and friendship with the lunatic. From such an office, bankruptcy, unless under circumstances of disrepute, affords no reason for removal; and many affidavits represent this person as highly respectable. He became bankrupt in *November*, 1816, has obtained his certificate, and is now, therefore, in a situation in which no objection could be made to his holding even a pecuniary trust. In the case cited, the bankrupt had not obtained his certificate.

The LORD CHANCELLOR.

The Court will not remove a committee of the person merely because he is a bankrupt, whether he has or has not obtained his certificate; but bankruptcy is a circumstance deserving particular attention. Even if he has obtained his certificate, yet possessing, perhaps, no funds but those which are given for the maintenance of the lunatic, the bankrupt is under a temptation to appropriate a part to his own support, instead of applying the whole for the benefit of the lunatic. In the case cited, Lord *Loughborough* says, " It does not follow, that, if another committee is appointed, I shall change the care of the personal attendance of the lunatic; but they would have the administration of the money." It is true, it would not follow in many cases, that the Court would change the custody of the person; but there are instances, in which it might not be practicable otherwise to secure the allowance. The Court

a reference to the Master, " to approve a proper person to have the care of the person of the infant."

undoubt-

undoubtedly possesses a species of controul over the funds, if spent improperly by the bankrupt; but the true subject of consideration is, whether that has been done which is required for the comfort of the lunatic. In many cases, nothing can better promote that comfort, than care to avoid changing the custody of his person. The petition prays no more than the removal of the committee; but I am not bound by the prayer. When the physician, whether right or wrong, states that the establishment of the lunatic is not such as may be afforded from 600*l.* a-year, that is one reason why the establishment should be reviewed; but when I find that the lunatic has an income of 1300*l.* or 1400*l.*, if the physician is right in his opinion that the establishment does not provide for the comfort of the lunatic, but wrong in his opinion that more comfort may be afforded from 600*l.* a-year, I will not be stopped by the form of the prayer of the petition, but will direct an inquiry, whether the comfort of the lunatic has been sufficiently provided for, regard being had to the sum allowed.

GERARD *v.* PENSWICK.

April 24.

An agent, defendant to a bill for an account by his principal, ordered, on motion, to leave with his clerk in court, documents in his possession, containing entries relating to the cause; sealing up entries on other subjects, and making affidavit that he has sealed such entries only.

THE Defendant was the steward and agent of the Plaintiff, and the bill prayed an account of his receipts and payments in that character, and that he might "produce and deliver to the Plaintiff all books, papers, and writings in his custody or power, relating to the accounts." The Defendant having left with

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his clerk in court certain books and papers enumerated in his first answer, by a second answer admitted that he had in his possession other books of account, containing entries relating, some to his transactions as the agent of the Plaintiff, and others to his own private business. On this day the Plaintiff moved, that the Defendant might produce, and leave with his clerk in court, the books admitted by his farther answer to be in his possession.

Sir *Samuel Romilly* and Mr. *Horne*, in support of the motion.

The *Solicitor General* and Mr. *Girdlestone*, against the motion.

The Defendant offers inspection of the books at his own house in *Liverpool*, in the immediate neighbourhood of the Plaintiff; but objects to the expense and inconvenience of conveying them to *London*. They contain copies of letters, and entries of various transactions, in which the Plaintiff has no concern, relating to the private business of the Defendant, or of other persons for whom he is agent; and some of them are in daily use.

Sir *Samuel Romilly* in reply.

The books in question are not the books of a tradesman, containing the accounts of his trade in general, but the books of a steward, in which he was bound to enter his transactions in that character. He cannot privilege them by inserting entries on other subjects. Such entries he may seal up on oath; but the Court never compels a principal to attend at the house of his agent for the purpose of inspecting the accounts. There is no evidence that the books are in daily use: the

the last transaction between these parties occurred ten years ago.

The LORD CHANCELLOR.

There being no affidavit that the books are in daily use, the proper order is, that the Plaintiff shall leave them with his clerk in court, sealing up those parts which do not concern the plaintiff, and pledging himself by oath that he has sealed up those parts only. (*a*)

"This court doth order that the Defendant do, within three weeks, leave with his clerk in court in this cause, the several books of account, accounts, letters, and papers, vouchers and writings, relating to the matters in this cause, admitted by his farther answer to be in his possession, and the Plaintiff, his clerk in court, agent, or solicitor, is to be at liberty to inspect and peruse the same, and to take copies thereof, or extracts therefrom, as he may be advised, at his own expense; but the said Defendant is to be at liberty to seal up on oath such parts of the said several books, &c. as do not in any manner relate to the Plaintiff."

Reg. Lib. A. 1817. fol. 1038. (*b*)

(*a*) *Campbell* v. *French*. 1 *Anstr*. 58.

(*b*) In *Jones* v. *Powell*, 20th of *November*, 1816, on a motion for an attachment for not leaving with the clerk in court, and permitting the inspection of, documents pursuant to an order for that purpose, resisted on the ground that the documents contained passages not relating to the question, and improper for inspection, Lord *Eldon* C. said that the Defendants ought, on the motion for an order to inspect, to have stated the existence of passages to the discovery of which they objected, and the order would then have been qualified as to those passages; and his Lordship, though he refused the application for an attachment, ordered the Defendants to pay the costs. — From Mr. *Merivale*'s notes.

On a motion for an attachment for refusal of production and inspection of documents, pursuant to order, or for immediate inspection, the Defendants objecting that the documents contained passages improper for inspection, the Lord *Chancellor* refused the application, but directed the Defendants to pay the costs of it.

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" *Jones* v. *Powell*, 14th *December*, 1816. Whereas Sir *Samuel Romilly* and Mr. *Wray*, of counsel for the Plaintiffs, this day moved and offered divers reasons unto this court, that an attachment might be issued against the Defendants, or some or one of them, for a contempt of this court, in not leaving in the hands of their clerk in court, in this cause, certain books of account, accounts, &c. and in not permitting the Plaintiffs, their clerk in court, or solicitor, to inspect, at the accounting-house of the said Defendants, certain other books, or to take copies of, or extracts from, all or any of the entries made in the said last-mentioned books, so far as the same relate to the matters in question in this cause, pursuant to an order made in this cause, dated the 7th day of *August* last; or that the Defendants, or some or one of them, might be ordered, within a week, to leave with their clerk in court, in this cause, all and every the books of account, accounts, &c. admitted by the answers of the said Defendants, or of any or either of them, to be in their, or any, or either of their custody, possession, or power, and that the Plaintiffs, their solicitors, attornies, agents, or accountants, might be at liberty to inspect, and take copies, extracts, or abstracts of the same, and that the Defendants, or some or one of them, might pay to the Plaintiffs the costs of this application; whereupon, and upon hearing Mr. *Leach*, Mr. *Bell*, and Mr. *Montagu*, of counsel for the Defendants, his Lordship doth not think fit to make any order upon this motion, but doth order, that the Defendants do pay to the Plaintiffs the costs of this application to be taxed, &c."

Reg. Lib. A. 1816. fol. 277.

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SAVILE *v.* The EARL of SCARBOROUGH.

ROLLS. *March* 11, 12.

Sir *G. S.* having devised certain estates to *R. L.* for life, with remainder to his first and other sons in tail, and like remainder to *J. L.* and his sons, with proviso, that if the title of Earl of *S.* should descend to *R. L.* or any of the persons named in remainder, the estates should go to the person next in remainder, as if the person so becoming Earl were dead without issue; and having directed that all his family pictures in his mansion-houses should be heir-looms, and be held with his mansion-houses by the person in possession thereof under his will, and given the use of his prints to *G.* for life, and after his decease to *F.*; bequeathed to trustees all household goods, furniture, glasses, and linen, &c. in his mansion-house, (except the family pictures and prints not framed,) to sell such parts as should be in his house (except his family pictures) as they should think proper, the other part, which might be thought worth keeping, to be removed to his house at *R.*, and to dispose of, or to retain, such of his effects at *R.* as they should think proper; and after his debts should be reduced to 35,000*l.*, then as to his family pictures, and such of his effects at *R.* as should remain unsold, in trust for *R. L.* if living, for his own proper use and benefit; but if he should die without leaving issue male living, in trust for *J. L.* or such person as should become entitled to the possession of his estate at *R.*, for the same right and interest as before declared with regard to *R. L.*:

The family pictures are heir-looms, but *R. L.* being alive when the debts are reduced to 35,000l. becomes absolutely entitled to the remaining personalty.

SIR *George Savile*, of *Rufford*, in the county of *Nottingham*, Baronet, by his will, dated the 19th of *August*, 1783, devised certain freehold estates in the counties of *York* and *Nottingham*, and the bishopric of *Durham*, (subject to two terms of twenty-one years and 500 years,) to the use of his nephew the Honourable *Richard Lumley*, the second son of his sister *Barbara* Countess of *Scarborough*, by *Richard* late Earl of *Scarborough*, for his life; remainder to trustees to preserve contingent remainders; remainder to his first and other sons successively in tail male; remainder to the use of his nephew, the Honourable *John Lumley*, the third son of *Barbara* Countess of *Scarborough*, for his life; remainder to trustees to preserve contingent remainders; remainder to his first and other sons successively in tail male, with remainders over; and the ultimate remainder to the testator's right heirs. The will contained a proviso, that if the title of Earl *Scarborough* should descend or come to *Richard Lumley*, or *John Lumley*, or to any of the other persons named in remainder, the estate which he or they should then be entitled to in the hereditaments devised under the will, should cease and become void; and the same hereditaments should immediately thereupon go to the person or persons who, under the limit-

ations aforesaid, should then be next in remainder expectant, on the decease and failure of issue male of the person to whom the said title should so descend or come, in the same manner as such person or persons so in remainder would take the same by virtue of the will, in case he or they to whom the title of Earl of *Scarborough* should come in possession, was or were actually dead without issue. The will then empowered the persons, who should be successively entitled in possession under the will, to grant leases for any term not exceeding twenty-one years, of the hereditaments devised, except the mansion-house at *Rufford*.

The testator devised his leasehold mansion-house in *Leicester-fields*, and all other his leasehold estates, to *J. H.*, *J. M.*, and *G. M.*, in trust, subject to the rents reserved by, and the covenants contained in, the lease, for such persons, and for such estates, and subject to such provisos and limitations over, as were before expressed concerning his freehold estates in the county of *Nottingham*, or as near thereto as the nature of the leasehold estate would admit, to the end that the said leasehold premises might be enjoyed and go along with the said freehold estates, as long as the rules of law and equity would permit.

The testator directed that all his family pictures which, at the time of his decease, should be in his mansion-houses at *Rufford* and *Leicester-fields*, or either of them, should be deemed and considered as heir-looms, and should descend and go, and be held and enjoyed with, his said mansion-house, by the person or persons who, for the time being, should be in possession of, or entitled to, the same mansion-houses, by virtue of his will; and he gave the use of all his prints not framed, and books of prints, to Mr. *Peter Grandy*,

during

during his life, and after his decease, to *Francis Ferrand Foljambe;* and he gave and bequeathed to the said *J. H.*, *J. M.*, and *G. M.*, their executors and administrators, all the household goods, furniture, glasses, linen, plate, china, books, busts, statues, pictures, and other ornaments, which at the time of his decease should be in his said mansion-houses, or either of them, (except the family pictures and prints not framed,) and also all the stores of wines, and other liquors and provisions of housekeeping, that should at the time of his decease be in his said mansion-houses, or either of them, and all his carriages and horses, and all his implements and utensils of husbandry and gardening at *Rufford*, and all other his live and dead stock there, for the purposes following; that is to say, to sell and dispose of such part thereof as should be in his house in *Leicester-fields* (except his family pictures) as they should think proper, and the other part thereof as might be thought worth keeping, to be removed to his house at *Rufford;* and also to sell and dispose of such part of his live and dead stock and effects at *Rufford* as they should think proper, and to retain and keep such part of his effects at *Rufford* as they should think proper; and when the debts he should owe, and the legacies he should think fit to give by any codicil or codicils, should be reduced to 35,000*l.*, then as to his said family pictures, and so much and such part of his effects at *Rufford* as should remain unsold, in trust for his said nephew *Richard Lumley*, in case he should be living, for his own proper use and benefit; but if his said nephew *Richard Lumley* should die before that time, without leaving any issue male of his body lawfully begotten, living at the time of his decease, or born in due time after, then in trust for any one of them, the said *John Lumley*, or the several other persons therein named, who should become entitled to the possession of his said estate

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estate in *Nottinghamshire*, at the expiration of the term of twenty-one years, for such and the same right and interest as thereinbefore declared, with regard to his nephew *Richard Lumley*, in case he should die without leaving any issue male of his body lawfully begotten, living at the time of his death; the elder of the said younger sons of his said sister the Countess of *Scarborough* being always preferred, and to take before the younger of them. The testator appointed *J. H. F. F. Foljambe*, *J. M.* and *G. M.* executors.

The testator died shortly after the date of his will, and his debts having been reduced to the sum of 35,000*l.*, *Richard Lumley*, under an order of Court, dated the 22d of *July*, 1789, entered into possession of the estates in the county of *Nottingham* and in *Leicester-fields*; and under another order, dated the 18th of *March*, 1793, he entered into possession of the rest of the estates; the trusts of the terms of twenty-one years and 500 years having been satisfied.

On the 5th of *September*, 1807, by the death of the late Earl of *Scarborough*, the earldom descended to *Richard Lumley*, and thereupon *John Lumley* having (in pursuance of a proviso in the will) assumed the surname, and quartered the arms, of *Savile*, became entitled to an estate for life in the freehold and leasehold premises.

The testator, at the time of his death, was possessed of certain family pictures in his mansion-houses at *Rufford* and *Leicester-fields*, and also of certain household-furniture, glasses, plate, linen, china, books, busts, statues, pictures, and other ornaments, implements of husbandry and gardening, carriages, horses, and live and dead stock,

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stock, and other articles mentioned in his will, and of certain fixtures in or attached to those houses, of very considerable value. Soon after his death, the executors sold such part of these several articles (except the family pictures) as was necessary for the purposes of the will, and retained the residue on the trusts thereby declared, and in pursuance thereof permitted *Richard Lumley* to enjoy the same, with the mansion-houses. A great part of the household-furniture, glasses, plate, books, busts, statues, and pictures, and other articles bequeathed to *J. H.*, *J. M.*, and *G. M.*, on the trusts of the will, were removed by *Richard Lumley* from the house at *Rufford.*

The bill filed by the Honourable *John Lumley Savile* against the Earl of *Scarborough*, prayed an account of all the household furniture and other articles bequeathed to *J. H.*, *J. M.*, and *G. M.*, of which the Defendant had had the use, and of what part had been lost, destroyed, or disposed of by him; a declaration that the Plaintiff was entitled to the use of such several bequeathed articles for his life; and that the Defendant might be decreed to account for or restore to the Plaintiff such of them as should appear to have been at any time removed by him from the mansion-house at *Rufford*, or to have been lost or destroyed by him or applied to his own use.

The Defendant, by his answer, claimed under the will to be entitled absolutely to all the articles in question, except the family pictures.

Mr. *Bell* and Mr. *Pepys*, for the Plaintiff.

The family pictures are unquestionably heir-looms: the testator has, in express terms, declared them such; and

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and the Court will not permit that explicit unequivocal declaration, to be controlled by a subsequent ambiguous clause. On this point, Lord *Hardwicke's* judgment in *Trafford* v. *Trafford*(a) is decisive. The furniture and other property are disposed of by the same clause with the family pictures; and the intention in the instance of the pictures being clear, the Court will not impute, with reference to the other articles, a different meaning to the same words in the same sentence. Some of these articles being perishable, the testator confers on his trustees a discretionary power of sale, in order that such as are unfit to be retained may be sold. The remainder are to be removed from *Leicester-fields* to his house at *Rufford*; a direction inconsistent with the supposition that they were to become the absolute property of the defendant, but explained by the fact that the testator had only a leasehold interest in the house in *Leicester-fields*, and designed to annex these articles to the inheritance of his settled estate. The reduction of the debts, to the sum of 35,000*l*., an event depending on the discretion and management of the trustees, ascertained the period, not at which the absolute property was to vest, but at which the usufruct was to commence. The expression, that the trustees should hold in trust for the defendant and the successive persons entitled, demonstrates that they were to take the enjoyment only, not the absolute dominion. On the opposite construction, if the defendant had died before the debts were reduced to 35,000*l*. leaving issue, these articles were undisposed of; for the clause contains no gift to his children, and the persons in remainder were to take only in the event of his dying without issue: a most extraordinary omission on a subject about which the testator was so anxious. That clause proves that the testator understood that he had not given an

(a) 3 *Atk.* 347.

absolute

absolute interest to the defendant. In the event specified, the same interest which *Richard Lumley* would have taken is given to the person succeeding to the real estate; the elder being always preferred, and to take before the younger; words descriptive, not of the person, but of the order of succession and quantity of estate, denoting a series of limited interests: the inference is inevitable that *Richard Lumley's* interest was limited only, not absolute. The testator intended a benefit to the issue of the tenants for life, commensurate with their respective interests in the real estate; and that intention can be executed only by annexing these articles in the character of heir-looms to the inheritance.

The MASTER *of the* ROLLS.

You are entitled to present another difficulty; suppose, that before the debts were reduced to 35,000 *l*. the Defendant had become Earl of *Scarborough*, was he, having lost by that succession his title to the estate at *Rufford*, in the event of the reduction, to take the furniture?

Sir *Arthur Piggott* and Mr. *Heald*, for the Defendant.

The Defendant was the primary object of the testator's bounty: the furniture is given to him, in the actual event, for his own use and benefit, without any direction that it should be annexed to the inheritance. Could the testator intend that carriages, horses, wine, and linen, should be heir-looms? With regard to the family pictures, the latter words of the clause control the former, and the Defendant is entitled to them with the rest of the furniture.

The MASTER *of the* ROLLS.

I have no doubt on the construction of this will, except

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cept as to the family pictures. The household goods are clearly not heir-looms. I find nothing to unite those articles with the preceding clause, which is exclusively confined to the pictures. The testator begins by distinguishing with predilection the family pictures from all the other furniture, exempting them from the power of sale, meaning to perpetuate them in the family, and denominating them heir-looms. Had he intended to constitute other articles heir-looms, he would then have expressed that intention; knowing how to direct the permanent enjoyment of personal property, by giving to it the character of an heir-loom, he has given that character to the pictures only. It would be difficult for the Court to supply that denomination to other articles not in the same class, or named in the same sentence, or likely to be objects of the same predilection. The testator had evidently quitted the train of reasoning relative to heir-looms, before he proceeded from the family pictures to the general furniture; and then, selecting no particular articles, he commits the whole class to the discretion of his executors, expressly excepting from the power of sale the family pictures. Why is the Court to fetter personal property as an heir-loom by presumption and forced inference, without any word denoting that intention, and in the instance of a testator, who, when such was his design, knew how to express it? He gave an absolute power to sell every item of furniture, except specific bequests and family pictures. Were the articles perpetuated as heir-looms to be what the executors might happen to leave unsold? The gift, of what remained unsold to *Richard Lumley*, is plainly expressed; a gift for his own use and benefit without qualification. It is needless, more especially in the construction of an instrument which provides very imperfectly for contingencies, to consider an event which has not occurred, his death before the specified period,

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leaving issue; it is sufficient that in the actual event the property is bequeathed to him for his use and benefit. The Court must give effect to words admitting a clear interpretation, with whatever difficulties attended.

With respect to all the rest of the furniture, therefore, I entertain no doubt. In reference to the family pictures, the testator has first expressed an intent that they should be heir-looms; and the Court, instead of presuming that he had abandoned that intent, must, if possible, give effect to it. I think, therefore, that the Court may make a distinction, and declaring that an absolute interest passes in the furniture, may direct the pictures to be enjoyed as heir-looms. With regard to them, the will contains express words to qualify the right; and that qualification is still consistent with the terms use and benefit. By a similar reasoning, Lord *Hardwicke*, in *Trafford* v. *Trafford*, held the general expressions restrained. The objection, that this construction imputes a different meaning to the same words, use and benefit, in the same clause, as giving an interest, qualified in one case, and absolute in the other, is not conclusive; the testator having plainly expressed his intention, in one instance, to give only a limited interest. At present, therefore, I am of opinion that the family pictures are heir-looms, and that the rest of the furniture is the absolute property of the defendant.

1819. *July* 7.

On this day the cause was reheard; Mr. *Bell* and Mr. *Pepys* for the Plaintiff, Sir *Arthur Piggott* and Mr. *Heald* for the Defendant.

The MASTER *of the* ROLLS, repeating the substance of his former judgment, made the following additional observations.

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The Plaintiff insists that having become entitled under the limitations of the will to the real property devised, he is entitled also to certain personal property, which it was the intention of the testator to annex to the real, so long as the rules of law permit. That claim, it is incumbent on the Plaintiff satisfactorily to establish. A claim, which in effect attempts to restrain alienation, and permanently to give to personalty the character of annexation to realty, can be enforced only on clear proof; not by doubts on the construction of the will, or conjectures of intention insufficient to control plain words. The whole of the testator's furniture, live and dead stock, &c. is given in the first instance to trustees, in trust to sell all that they should think fit, with an exception which I shall presently notice; the first object seems to have been a sale. A discretion is committed to the executors to retain such part of this property as they shall consider worth keeping, but subject to that, the whole is to be sold in payment of the debts, which were considerable. It has been justly observed that the will is drawn by a person who perfectly knew how to render personal property inalienable, and this clause begins with giving the character of heir-looms to a part of the furniture, the family pictures. The subject of heir-looms being thus particularly presented to the testator's attention, it is natural to suppose that he would then give that character to all which he was desirous to preserve; that he would not omit to unite with the family pictures whatever other articles he intended to remain with them, as monuments of the antiquity of his family. The pictures he has not expressly given, but directs that they shall be enjoyed by the persons successively taking his estate. Next occur other articles, prints not framed, and books of prints, which he selects from among his personalty, and directs the use of them to Mr. *Grandy* for life,

 and

and after his decease, to Mr. *Foljambe*, and bestowing on them a care which he has not applied to any other part of his personalty, directs a list to be immediately made, and an undertaking to be signed by Mr. *Grandy* for their delivery on his decease. This peculiar care of the family pictures and these prints, contrasted with the general discretionary power entrusted to his executors, to sell any part of the rest for payment of his debts, without any rule of discrimination what should be disposed of and what reserved, are little reconcileable with the supposed intention of securing the permanent enjoyment of both these classes of property. That discretionary power might be given to the executors, in order that the first taker should not have his house stripped of live or dead stock, plate, or other articles, which might be more conveniently retained than sold, and affords no evidence, therefore, of a general design to control the particular words; a design to place the articles which the executors might select to be retained, on the same basis with the family pictures. Such an intention would probably have produced identification and description of the articles intended; he could not mean that his executors should determine what articles he wished to be heir-looms. But without conjecture, it is enough to say, that his purpose being expressed only as to some articles, and not expressed as to others, the Court is not at liberty to extend it to the latter.

The form of gift to *R. Lumley* is too clear to admit doubt. The words "for his own use and benefit," are the common language to express the largest right that can be given over personal property, and are used throughout the will when rents and profits are to be enjoyed absolutely. The word "proper," introduced here, certainly cannot weaken the force of the sentence. There is nothing to qualify the right of *R. Lumley*, sup-

 posing

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posing him to live to enjoy the property at all. It is contended that as the testator confessedly did not intend to give the family pictures to *R. Lumley* absolutely, the Court must construe the words "his own proper use "and benefit," as giving less than an absolute interest. But it has been fairly replied, that the effect of that argument is not to reduce the general import of those words, but to create doubts whether the pictures should be heir-looms beyond the first taker; for it is clear that the latter words of a will, if not reconcileable with the earlier, must govern the construction. To the family pictures the testator must be understood as having given the character of heir-looms, not by the sentence in which this phrase occurs, but by the antecedent words; but no expressions qualify the phrase, in reference to other articles. The pictures are the subject of two clauses, the first conferring on them alone the general character of heir-looms, the next bequeathing them with the rest, to the use and benefit of the Defendant. In *Trafford* v. *Trafford* there could be no doubt that the clause was one entire disposition of the several articles nominated, rendering all heir-looms. When the argument was pressed as to the residue, Lord *Hardwicke* says, the inference is not correct, that because the residue is given to the same individuals, it is also to devolve as an heir-loom, "for the devise of "the residue wants the very clause which constitutes "and makes the other go as heir-looms." (*a*) So I say the bequest of the other goods wants the very words which give to the family pictures the character of heir-looms.

But the question remains, in what event is any thing given to the Plaintiff? By the words of the will, under

(*a*) 3 *Atk.* 349.

which

which alone he claims, if *R. Lumley* died before the debts are reduced to 35,000*l.*, and without issue, this property then devolved among the rest to the Plaintiff; but that event has not happened: *R. Lumley* is not dead; how then can the Plaintiff now claim what is given on a contingency that has not occurred? The supposed general intent to transfer the right of enjoying this property, to all persons who were to succeed to the real estate, is not expressed. If in the event of *R. Lumley* living and becoming Earl of *Scarborough*, it was to devolve to the Plaintiff, why has the testator not so declared? The direct contrary is expressed. If *R. Lumley* should live till the debts are reduced to 35,000*l.*, then whether Earl of *Scarborough* or not, he is to take this property, and it is not to go over unless he dies without leaving children; the other branches of the family may enjoy the estates, but nothing entitles them to enjoy this property. The words totally fail; no contingency is expressed, in which the Plaintiff could acquire any interest in the personalty, merely by acquiring the real estate.

I am of opinion, therefore, that the Defendant is entitled to this property absolutely, and that the Plaintiff in the actual event has no interest.

The bill was dismissed so far as it sought an account of the household goods, furniture, plate, linen, china, books, and of all the articles bequeathed by the testator, to *J. H. J. M.* and *G. M.*, upon the trusts of the will, except the family pictures, which at the time of his decease were in the mansion-house at *Rufford* and *Leicester-fields*, which were declared heir-looms, to descend and be enjoyed with the mansion-houses.

Reg. Lib. B. 1818, fol. 1950.

1818.

May 2.

BROOKE *v.* CLARKE.

On a bill for injunction against an invasion of copyright, and an account; a court of law having certified that the Plaintiff had no interest in the copyright in question, the bill cannot be dismissed on the defendant's motion.

THE Plaintiff claimed, under an assignment made on the 12th of *February*, 1817, the copyright in Mr. *Hargrave's* notes on Lord *Coke's* First Institute. The bill, alleging that the Defendants had lately published a new edition of the notes, prayed an injunction and an account. On the motion for an injunction (*a*), the Lord *Chancellor*, doubting the title of the Plaintiff, directed a case for the opinion of the Court of King's Bench; and the Judges having certified that the Plaintiff, by virtue of the assignment, did not take any interest in the notes (*b*), the Defendants now moved to dismiss the bill with costs.

Mr. *Hart* in support of the motion.

The order directing an issue was decretal, and the certificate having negatived the right on which the Plaintiffs insist, the Defendants are entitled to be protected from farther vexation. On bills for specific performance of contracts, the question of title is decided under a reference to the Master, on motion; and the Court compels the Plaintiff, if the Master's report is adverse to him, to abandon the suit, or subvert the report. The same principle of preventing the vexation of fruitless litigation, on which that practice is founded, authorises the present application.

Sir *Samuel Romilly*, against the motion.

The order made was not decretal but interlocutory, for the purpose of assisting the Court to decide the

(*a*) *March* 13. 25. 1817.

(*b*) 1 *Barn. & Ald.* 396.

question

question whether an injunction should be granted. The Plaintiff claims an account of the copies sold.

The LORD CHANCELLOR.

On a bill for specific performance, in which the single question is, whether the Plaintiff can make a good title, the Court, in modern times, directs on motion, a reference to the Master to inquire into the title. (*a*) It was not till that rule had been some time established, that we adopted another practice of proceeding on the report by motion: it was long thought that the cause must be heard on farther directions: I altered the course, thinking that after the first question had been decided on motion, the cause might be so disposed of. That may be considered as an exception.

In this case the application is for an injunction: I doubted the Plaintiff's title; but that being a question of law, a case was directed for the Court of King's Bench. The

(*a*) That practice was introduced by Lord *Thurlow*, (*dict. arg.* v. *Shelton*, 1 *Ves. & Bea.* 517.) on an experimental application suggested at a consultation between Sir *James Mansfield* and Lord *Eldon*, (*Eldridge* v. *Porter*, 14 *Ves.* 139.) Being perfectly established in cases where it appears by the answer, (*Moss* v. *Mathews*, 3 *Ves.* 279. *Wright* v. *Bond*, 11 *Ves.* 39. *Todd* v. *Gee*, 17 *Ves.* 278.) or by admission at the bar before answer, (*Balmanno* v. *Lumley*, 1 *Ves. & Bea.* 224., (see 1 *Mer.* 372.) *Matthews* v. *Dana*, 3 *Madd.* 470.) that the title is the only subject of dispute between the parties, (*Briscoe* v. *Brett*, 2 *Ves. & Bea.* 377.) it does not prevail where the performance of the contract is resisted on other grounds. (*Gompertz* v. , 12 *Ves.* 17. *Blyth* v. *Elmhirst*, 1 *Ves. & Bea.* 1. *Paton* v. *Rogers*, 1 *Ves. & Bea.* 351. v. *Shelton*, 1 *Ves. & Bea.* 516. *Lowe* v. *Manners*, 1 *Mer.* 19. *Morgan* v. *Shaw*, 2 *Mer.* 140., and see *Wallinger* v. *Hilbert*, 1 *Mer.* 104.) The policy of the practice being questionable, (*Eldridge* v. *Porter*, 14 *Ves.* 139.) it is not extended by analogy; and therefore a Defendant to a bill for an account cannot on motion, after answer submitting to account, obtain a reference to the Master to take the account. (*Eldridge* v. *Porter*, and see *Fullagar* v. *Clark*, 18 *Ves.* 481.)

 Judges

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Judges certify that the Plaintiff has no title. We have therefore advanced thus far, that the Plaintiff cannot succeed in the motion for an injunction; and the case stands as if I had declared my own opinion to that effect; but I fear that this bill cannot be dismissed without more delay. The cause may still be brought to a hearing. The person who then presides here may entertain a different opinion on the question of title.

Motion refused.

April 1.

PENFOLD v. RAMSBOTTOM.

The Defendant not appearing in support of a demurrer, the Court, on production of an affidavit of service of the order for setting down the demurrer, will not over-rule the demurrer, but hear the Plaintiff.

IN the course of an application in this case, it was stated that the Vice-Chancellor had over-ruled the demurrer of one of the Defendants, not appearing when the cause was called on, on production of an affidavit of service of the order for setting down the demurrer.

The LORD CHANCELLOR.

According to strict practice, on a demurrer, if the Plaintiff has not an affidavit of service of the order for setting down the demurrer, the cause may be struck out of the paper; if an affidavit of service is produced that authorises the Court, in the absence of the Defendant, not to over-rule the demurrer, but to hear the Plaintiff.

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RAVEN v. WAITE.

ROLLS.
June 12.

A sum being bequeathed on trust, to apply the interest towards the maintenance and support of *F. R.* (separated from her husband, the testator's nephew, with separate allowance on condition of maintaining her children, and assisted by a voluntary annuity from the testator during his life,) and the maintenance and education of her children until the youngest should attain 21, and after that event to *F. R.* so long as she remained the wife or widow of her present husband; with a direction, in case of her death or marriage before that event, to the trustees, to take the children under their care, *F. R.* is not entitled to interest from the death of the testator; the exception to the general rule, in case of legacies by persons in *loco parentis*, not extending in favour of an adult legatee, and the will expressly directing payment to certain annuitants within a year from the testator's death.

FRANCES RAVEN having, in 1809, exhibited articles of the peace against her husband *John Raven*, he executed a deed of separation, by which some property of the wife, producing a small annual income, was conveyed in trust for her separate use, she agreeing to take upon herself the maintenance and education of her six infant children by her husband. From the date of the deed, the husband and wife had continued to live apart, the husband neither contributing, nor being in circumstances to contribute towards the maintenance of his wife and children. The wife being unable to provide for their support, *Josiah North*, the husband's uncle, assisted her by the advance of several sums; and about the 1st of *November*, 1809, fixed his voluntary allowance to her at 60*l.* a-year, which he paid quarterly till his death, on the 5th of *November*, 1815.

By his will, dated the 2d of *April*, 1810, *Josiah North* bequeathed to each of the children of his nephew *John Raven*, who should be living at the testator's decease, 300*l.*, to be paid as they respectively attained the age of twenty-one years; directing, that in case any of them should die under that age, unmarried and without issue, their shares should sink into the residuum of his personal estate; the testator then bequeathed to *John Waite*, *John Day*, and *Robert Day*, (his executors and devisees in trust,) 1600*l.* upon trust, to place the same at interest on government or real security, and to pay and apply the interest and proceeds, from time to time,

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as the same should become due, for the maintenance and support of *Frances Raven*, and the maintenance, education, and bringing up of all and every her children, until the youngest of them should attain his or her age of twenty-one years; and from that event, to pay the interest of the said sum of 1600*l.* to *Frances Raven*, during such part of her life as she should remain the wife of the said *John Raven*, for her own sole and separate use, and he directed that her husband should not intermeddle therewith, neither should the same be subject to his debts, control, or engagements, and that her receipt should be a sufficient discharge to his trustees; and in case of the death of *John Raven*, he directed his trustees to pay the interest to *Frances Raven* during such part of her life as she should continue his widow, but in case she should die during the life of her husband, or in case of his death before her, should intermarry with any other person, then he directed that his trustees, and the survivor of them, his executors, &c. should take the said children under their sole care and management, (as it was his express will that *John Raven* should not receive any benefit arising from the sum of 1600*l.*,) and apply the interest thereof towards the maintenance, education, and bringing up of all and every the said children, until the youngest of them should attain the age of twenty-one years; and when the youngest should have attained that age, he directed that the said principal sum of 1600*l.*, and the interest then due thereon, (in case *Frances Raven* should be then dead or married again,) should sink into the residuum of his personal estate for the benefit of the persons entitled thereto. The testator also bequeathed to *John Raven* an annuity of 20*l.* for his life, and to other persons various annuities, with directions for their commencement from the first quarter-day ensuing his death.

The

The bill filed in behalf of *Frances Raven* (by her next friend) against the executors of *North*, prayed a declaration that she was entitled to the interest on the sum of 1600*l.* from the testator's death, and payment accordingly.

Mr. *Bell* and Mr. *Barber*, for the Plaintiff.

The rule, that a pecuniary legacy bears interest only from the expiration of a year after the death of the testator, is subject to various exceptions. Legacies for the benefit of the testator's infant children, *Crickct* v. *Dolby* (*a*), or of persons towards whom he stands *in loco parentis*, *Acherley* v. *Wheeler* (*b*), *Hill* v. *Hill* (*c*); or, in general, under circumstances from which the court infers an intention, that the legacy should be applied for the support of the legatee, *Beckford* v. *Tobin* (*d*), *Tyrrell* v. *Tyrrell* (*e*), bear interest immediately from the testator's death. In this case, the testator avowedly placed himself *in loco parentis* to the plaintiff and to her children, allowing an annuity during his life, and bequeathing the legacy in question expressly for their support. The bequest is for the benefit of the children as well as of their mother, and had she died before the testator, the children would have been indisputably entitled to interest from his death? Upon what principle can their claim be prejudiced by her participation? Lord *Alvanley* expressed a decided opinion, that a wife is within the same exception as a child. (*f*) Another circumstance also exempts this case from the general rule: the capital of the legacy is given, not to the children, but to the residuary legatees, and their title to the interest ceases at the age of twenty-one. It has been decided, that the tenant for life of a residue is entitled to

(*a*) 3 *Ves.* 10. (*b*) 1 *P. W.* 783. (*c*) 3 *Ves. & Bea.* 183.
(*d*) 1 *Ves.* 308. (*e*) 4 *Ves.* 1. (*f*) 3 *Ves.* 16.

interest

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interest from the death of the testator. *Gibson* v. *Bott.* (*a*) The benefit given to the children is an annuity commencing at the testator's death.

Mr. *Fonblanque* and Mr. *Blenman*, for the Defendants.

None of the exceptions to the general rule comprehend this case, a legacy by a *stranger* to an *adult*. The testator was under no moral obligation to provide for the objects of his bounty; the mere direction to apply the interest for their maintenance, will not alone entitle the legatee to interest from the death of the testator. *Beckford* v. *Tobin*. The benefit here is given to the mother, not to the children; and it has been decided, that a bequest of the interest of a fund, to an individual who has no child, for the maintenance of her children, is due to that individual. (*b*) The mother being adult, this case is within the terms of *Lowndes* v. *Lowndes* (*c*), in which the Court of Exchequer, over-ruling the *dictum* of Lord *Alvanley*, declared that the exception is not extended to adults. The testator has directed that some annuities, created by his will, should commence from the quarter-day succeeding his death; had he intended that interest on this legacy should be payable before the usual period, it is presumable that he would in like manner have expressed that intention.

The MASTER *of the* ROLLS.

My present impression is, that the Plaintiff cannot sustain her claim, either on the language of the will, on principle, or on authority.

(*a*) 7 *Ves.* 89. And see *Francis* v. *Young*, 9 *Ves.* 553. But it has since been decided by the present Vice Chancellor, that a residuary legatee for life is not entitled to interest until the expiration of a year from the death of the testator. *Stott* v. *Hollingworth*, 3 *Madd.* 161.

(*b*) *Hammond* v. *Neame*, *ante*, p 35.

(*c*) 15 *Ves.* 301.

The

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The Plaintiff to whom the legacy was primarily given, is adult, a wife separated from her husband, with separate maintenance, the amount of which does not appear, given to her on condition of maintaining her children: her situation in life is not in evidence, whether she is in circumstances to provide for herself; but it appears, that in addition to her separate maintenance, the testator allowed to her an annuity of 60*l.* *The question is, whether he intended that interest should commence on this legacy from his death? The undisputed general rule, that a legacy carries interest only from the expiration of a year after the death of the testator, is founded on this reason, that interest is given for non-payment of the legacy when due; and that a legacy for the payment of which no other period is assigned by the will, is not due till the end of the year: but that general rule has exceptions; and however reluctant the Court may be to admit them, as productive of litigation, and the difficulty of knowing where to stop, established and authorized exceptions must prevail. The first exception is a specific legacy, an immediate gift of the fund with all its produce. (*a*) This legacy is clearly not specific. Another exception, which raises the present question, is, a legacy for the maintenance of the infant children of the testator. The foundations of that exception are, the natural obligation of the parent to provide for his child, and the incompetence of the child to give a discharge for the principal. The Court, therefore, concludes that the parent has postponed payment of the principal, in respect only of this inability to give a discharge, and infers an intention that interest shall be paid immediately.

It is unnecessary here to inquire whether the exception has not been extended in favour of children without

(*a*) *Barrington* v *Tristram*, 6 *Ves.* 345.

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any very solid ground; but can any authority be found which carries the exception further? All the cases decided are cases of infants. In *Cricket* v. *Dolby* (a), the *reasoning* of Lord *Alvanley* is expressly confined to infants; in *Beckford* v. *Tobin* (b), Lord *Hardwicke* founded his decree on the infancy of the legatee; and in *Hill* v. *Hill* (c), Sir *William Grant* recognized the authority of *Beckford* v. *Tobin*, upon the point of infancy, and adopted the same principle. In *Lowndes* v. *Lowndes* (d), the Court of Exchequer decided, that in the case of illegitimate children infancy will not authorize an exception to the general rule. I own, I do not see the distinction between that case, so far as the *Hooks* were concerned, and *Beckford* v. *Tobin*; the declared and principal purpose of the testator was not, as by what I cannot but think a forced construction, the Court held, to prevent alienation, but to provide maintenance. There, however, under the circumstances, the Court refused to extend the exception to a legacy in favour of an infant; but no case has been produced in which it ever was extended to a legacy in favour of an adult, though cases innumerable must have occurred of legacies to persons aged and decrepid, objects of the testator's bounty during his life.

On what principle could such an exception in favour of adults be founded? On necessity? But it is said, that the circumstances of the legatee are immaterial. On the terms "maintenance and support?" What charm is there in those words? In what instance of an adult legatee have they been held to confer a right to immediate interest? Neither reason nor authority extend the exception to adults. The only instance in

(a) 3 *Ves.* 16.
(b) 1 *Ves.* 308.
(c) 3 *Ves. & Bea.* 183.
(d) 15 *Ves.* 301.

which

which such a doctrine has been countenanced, is the dictum of Lord *Alvanley* in *Cricket* v. *Dolby*, that "a wife would come under the same exception as a child;" but he immediately reduces the authority of that dictum, by acknowledging that all his learning and experience had discovered no such case; and suggesting, that it could hardly ever happen that a wife has not some other provision. Lord *Alvanley* adds, "and that may make a difference in the case of a child;" intimating, that the claim of a wife partially provided for might be distinguished from the claim of a child.

Opposed to the dictum of Lord *Alvanley* thus qualified, is the direct decision on the point by the Court of Exchequer in *Lowndes* v. *Lowndes*; a decision which was unanimous, and pronounced after having been suspended from a deference to the dictum of Lord *Alvanley*, and for the purpose of maturely considering it. The extension of the exception to an adult is therefore negatived by the latest, or rather the only, decision on the subject. The present is the case of an adult, and an adult partially provided for: the husband of the Plaintiff has actually made a provision for her and her children. For any thing that appears to the Court, she may be in affluent circumstances.

No expression in the will indicates the intention for which the Plaintiff contends. The disposition in favour of the annuitants shews that the testator knew how to direct an immediate provision when such was his meaning. Had he entertained that intention in favour of the Plaintiff, would he not have declared it, and inserted a direction for the payment of interest from his death?

It is then insisted, that this is a provision for the joint benefit

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benefit of an adult parent and her infant children; and that the exception in favour of the infants must prevail. But the gift here is to the mother, to enable her to maintain herself and her children, and the legacy is payable to her during her life; after her death, indeed, the trustees are to apply it for the maintenance of the children, but the mother is the primary object of the testator's bounty. Such a gift cannot form an exception to the rule.

The only remaining argument is, that if the Plaintiff had died in the life of the testator, the children would have been the immediate objects of this bequest. But supposing that the legacy had been given to an affluent individual for life, with remainder to the children, the general rule evidently could not be affected by the death of that individual in the life of the testator. The will must be construed as it stands, not as affected by events: the rule cannot change with subsequent accidents, because it depends on the intent of the testator; that is, the intent with which the will was written, and according to the state of circumstances at that time.

Neither the principle of the rule, and of the exceptions, therefore, nor the terms of the will, support the Plaintiff's claim. I cannot carry the exception beyond the authorities, and introduce a new case in which the rule is to be relaxed. (*a*)

Bill

(*a*) In *Stent* v. *Robinson*, 12 *Ves.* 461., Sir *William Grant* refused to extend the exception to the case of a wife, remarking that Lord *Alvanley*'s dictum is unsupported by authority, notwithstanding the numerous instances of legacies to adults. The following case, cited by Mr. *Maddock Princ.* and *Pract. of Chancery*, vol. ii. p. 84., is taken from a manuscript in the possession of the Editor.

Bill dismissed; costs to be paid from the residuary estate.

Reg. Lib. B. 1817. fol. 1398.

PETT *v.* FELLOWS and Others.

Michaelmas. 8 *Geo.* 2. 1733.

In *Canc.*

Legacies to infants payable at 21, with benefit of survivorship in the event of death under that age, and a power to the executors to apply any part of the legacies towards the maintenance of the legatees, bear interest from the death of the testatrix; the infants being her cousins, and destitute of other provision.

THE testatrix bequeathed to her cousin *Phineas Pett*, the sum of 100*l.*, to her cousin *Peter Pett*, 200*l.*, to her cousin *Elizabeth Pett*, 1000*l.*; "and in case any of the aforesaid three children, *Phineas*, *Peter*, or *Elizabeth*, shall die before the age of twenty-one, my intention being that their legacies shall be paid when they respectively attain those years, his or her legacy shall be equally divided between the survivors; and in case two of them shall die before the age of twenty-one, then the whole shall go to the survivor. I also give a power to my executors to apply any part of the aforesaid legacies towards the maintenance or education of the aforesaid three children, during their minority, as in their discretion they shall think fit." The question arising upon this will was, whether the legacies should carry interest, and if so, from what time?

The LORD CHANCELLOR,

It plainly appears that the testatrix intended these legacies should carry interest, and that she made them payable at twenty-one years of age, for no other reason than that if one of them died, his legacy might go to the survivors. It is a general rule, that legacies do not of their own nature carry interest till default is made in payment; if of an indefinite legacy, from a year after the death of the testator; if made payable at a future day, then to carry interest from such time of payment: but this is in case of strangers only; for in case of a child unprovided for, the legacy shall carry interest from the death of the father or mother who gave it. In the present case, the legatees are called cousins, and it is admitted

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admitted in the answer that they had no other subsistence.

Therefore decreed, that the executors should be accountable for interest, from the death of the testatrix, and that what had been paid for education and maintenance should be deducted, and what remained should be placed out in the funds till the legatees came of age, and then to apply to the Court to have them paid.

It was said at the bar, that the late *Attorney-General* and Mr. *Mead* had given their opinion that these legacies would not carry interest.

BARKSDALE v. GILLIAT.

May 21.

A testator having directed legacies to be paid at the expiration of six months after his decease, without deduction, the legatees are entitled to the full amount, and the legacy duty must be paid by the executors.

BY his will, dated the 20th of *December*, 1814, *Thomas Dent* bequeathed, among other pecuniary legacies, 500*l.* to the Plaintiff. The will contained the following clause: "I desire my executors to make payment of all the legacies, including the charitable donations or legacies, without any deduction, as given and bequeathed in this my will, at the expiration of six months from the time of my decease, or sooner if convenient: and I desire they will make sale of my property, my fifty-four shares in the Commercial Docks, my forty shares in the East *London* Waterworks, and all the shares I have or may have in the Banks of *Virginia*, and likewise my stock or property in the British funds, and all other property I have or may hereafter possess, for that purpose. A list of all my property at this time, or rather a statement of the presumed amount of the

same

same, is left with this will, being about 40,000*l.* sterling. I do hereby direct that my said executors shall make payment of my debts, if any, my funeral expenses, stamp-duty, and charges of proving this my will, and all other charges or expenses whatsoever, out of the surplus which may remain, or residue of my effects."

With the testator's will was enclosed a writing, dated 21st of *December*, 1814, in these words: "Private remarks relative to my will. My property, by an estimate, I have made out and left with my private papers, exclusive of interest and dividends, which may be received, will be about 40,000*l.* or 41,000*l.*; the different sums left in my will amount to 36,700*l.* sterling. When the Commercial Dock shares, the East *London* Waterworks shares, the *Virginia* Bank stock, and my property in the British funds are sold, my executors will be enabled to pay the legacies and donations within the time stated, and have a surplus of about 3000*l.* Out of this surplus sum is to be paid my debts, (if any,) the stamp-duty, and expense of proving my will, funeral and all other expenses. *T. C.* and Co's. note for 3000*l.*, can be paid to *T. C.* as his legacy. In addition to the surplus above stated, are debts due to me in *Virginia*, *North Carolina*, &c. *G. J.* of *Petersburg*, *Virginia*, is agent, having the books, bonds, and accounts, and acting under a power of attorney. The presumed value of these debts is 4000 dollars. The residue of my effects when all the payments are made, and all the claims are paid, is to be equally divided among my executors."

Soon after the death of the testator, one of the executors proved the will, together with the testamentary paper. After payment of the testator's debts, a surplus remained more than sufficient to satisfy all his legacies

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and bequests, his property having been considerably augmented since the date of the will, by the rise of the public funds of this country.

The bill filed against the executors prayed payment of the legacy of 500*l.*, without deduction. The defendants insisted on deducting the legacy duty.

On this day the Plaintiff moved, that the Defendants might be ordered to pay the legacy without deduction.

Mr. *Bell* and Mr. *Roupel*, in support of the motion, relied on the terms "without deduction," which, if the executors were allowed to deduct the legacy-duty, would become nugatory.

Sir *Samuel Romilly* and Mr. *Clason*, against the motion.

The legacy duty, although for the prevention of fraud the legislature has required it to be paid by the executor, is not a deduction from the legacy, but a charge upon the legatee after payment of the legacy. The testator has specified the charges which he meant his executors to defray, the stamp-duty, and expenses of proving his will. If the executors are to pay the legacy-duty, in addition to the legacy, the amount of the testator's estate at his death would not be sufficient to pay all the legacies; and the additional sum will itself be subject to duty, the payment not being expressly directed in terms required for the purpose of exemption, by stat. 36 *Geo.* 3. *c.* 52. § 21.

The LORD CHANCELLOR.

It seems admitted, that unless some qualified construction can be put on the words "without deduction," the

the will ought to be construed as directing payment of the legacies without deduction of the legacy-duty, as between the pecuniary and residuary legatees. It is contended, first, that the legacies being payable at the end of six months, the words "without deduction" mean payment of the full amount, without any allowance on account of payment before the expiration of the usual period, a year: that the executors were to pay, at the earlier period assigned, as much as would otherwise have been payable at the ordinary time. The difficulty of that argument consists in this, that the same construction must have been adopted, if the will had not contained the words "without deduction;" because, with or without those words, a duty is imposed on the executors of making payment at the end of six months, or sooner, if the funds could be conveniently applied. It struck me, that the legatees living in distant parts, some in Philadelphia, &c. the meaning of the testator might be, that their legacies should be paid without any charge in respect of the difficulty of making payment among individuals so resident; on reconsideration, I think that argument rests too much on conjecture.

Circumstances in which the Court is competent, for the construction of a will, to examine the amount of the testator's estate.

The case amounts to this: the testator, shewing that he is estimating the amount of his property, and its adequacy to the payments which he directs, the Court is competent to examine the proportion of that property to those demands. Calculations of property are clearly evidence in a case in which the testator has stated on his will, how, as he imagines, his property will stand, after the dispositions which he has made; and if, by the testamentary paper annexed to his will, he had shewn that the funds would not be sufficient to pay the legacies and the legacy duty, the legacies must be paid, charging the duty. As far, however, as I am master of figures, I cannot discover that: and, therefore, though

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I have a suspicion that the testator intended that the legacy duty should be deducted, my opinion, subject to considerable doubt, is, that these legacies must be paid without deduction of the legacy-duty.

Rolls, *June* 12. *July* 8. 15.

SKRYMSHER *v.* NORTHCOTE.

A testator having, by his will, directed his executors to transfer 500*l.*, part of his residuary estate, to *H. N.*, and made a specific disposition of the other parts, and having afterwards drawn a pen through the name of *H. N.*, and by a codicil declared that he razed her name out of his will with his own hand; the 500*l.* belong, as undisposed of, to his next of kin. The costs of ascertaining the right to that sum, paid thereout, in exemption of the general residue.

BY his will, dated the 19th of *June*, 1794, *Simeon Coley*, after a direction for the payment of his debts and some pecuniary legacies, (including 10*l.* to each of his executors for their trouble in executing the trusts of his will,) bequeathed to trustees all the residue of his estate and effects, upon trust to sell and convert into money such parts as should not consist of money, and invest the same, together with all the rest of his estate and effects not already invested in the funds, in the purchase of 5 *per cent.* Bank annuities, and to stand possessed of all his said estate and effects, and of the funds and securities for the same, upon trust to pay the dividends and annual produce between his two daughters, *Elizabeth Amelia Coley* and *Helen Coley*, in equal proportions for their separate use, during their respective lives, and after the respective decease of his said daughters as to their respective half parts, in trust for all and every their children, who being sons, should attain twenty-one, or being daughters, should attain twenty-one or be married. The will then proceeded thus: "And in case of and after the death of either of my said daughters, *Elizabeth* and *Helen Coley*, without leaving any issue entitled, or who shall live to become entitled, to the half part or share of her so dying, then as to the half

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half part or share of her whose issue shall so fail, upon trust to pay or transfer 800*l.* 5 *per cent.* Bank annuities, part of such moiety, unto my son *Simeon Coley*, his executors and administrators, and upon trust to pay or transfer 500*l.* like annuities, other part of such moiety, unto my "daughter *Hannah Northcote*, wife of *Thomas Northcote*, of *Piety-street*" (*a*), in the parish of St. *James, Clerkenwell*, in the county of *Middlesex*, goldsmith, her executors and administrators, and upon trust to pay and apply the interest, dividends, and annual produce of the remaining part of such last-mentioned moiety," for the separate use of the survivor of his two daughters during her life, in the same manner as her original moiety; and after the death of the survivor, the remainder of the moiety of his daughter first dying without issue, and the original moiety of the survivor, to be in trust for the children of the survivor, in the same manner as their mother's original moiety; and in case of, and after the decease of the survivor of his daughters *Elizabeth* and *Helen*, without leaving any issue who should live to become entitled to the said trust monies, he bequeathed one moiety of all the residue of the trust monies to his son *Simeon Coley*, his executors, &c. absolutely, and the other moiety "unto my said daughter *Hanah Northcote*" (*a*), her executors, &c. absolutely. The testator then appointed *John Swertner*, and his son *Simeon Coley*, joint executors.

A codicil, executed by the testator on the 7th of *June*, 1798, contained the following clause: "I razed the name of *Northcote* out of my will with my own hand. *S. Coley.*"

(*a*) In the original will, a pen had been drawn through the words printed betwee inverted commas.

On

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On the 22d of *June*, 1798, the testator died, leaving a son, *Simeon Coley*, and three daughters, *Hannah Northcote*, *Elizabeth Amelia Coley*, and *Helen Coley*, his next of kin. *Helen Coley* died on the 3d of *August*, 1815, unmarried, having attained twenty-one. By her will, dated the 29th of *July* preceding, she gave the whole of her property to her sister *Elizabeth Amelia Burrow*, (formerly *Coley*,) without naming any executor. On the 13th of *January*, 1811, *Simeon Coley*, the son, died, having by his will, dated the 13th of *March*, 1808, given all sums of money and other property to which, at the time of his decease, he should be entitled under the will of his father, and the stocks, funds, and securities, in which such sums of money and other property should be then invested, to *Christian Ignatius Latrobe*, *John Lewis Wollin*, and *John Clarke*, in trust for his two daughters, *Frances Elizabeth*, (afterwards married to *John Skrymsher*), and *Ann Amelia*, (afterwards married to *William Croft Fish*,) equally, to be vested at their respective ages of twenty-one years.

The bill filed by *Skrymsher* and *Fish*, and their respective wives, against the trustees named in the will of *Simeon Coley*, the younger, *Hannah Northcote*, and *Elizabeth Amelia Burrow*, prayed a declaration of the rights of the parties claiming under the wills of the father and the son. The question argued at the hearing was, who were entitled to the sum of 500*l.* five *per cent* bank-annuities, part of *Helen Coley*'s moiety of the residuary estate of her father, given in the event of her death without issue, to *Hannah Northcote*, whose name the testator afterwards erased.

Mr. *Trower* and Mr. *Maddock* for the Plaintiffs, Mr. *Hart*

Hart and Mr. *Hone* for *Hannah Northcote*, and Mr. *Bell* for the executors of the son.

The bequest of the sum of 500*l.* stock, was revoked by the erasure of the name of the legatee, and no other disposition of it being contained in the will, that sum passes as undisposed of to the next of kin. In this respect a residuary bequest differs from every other. A specific or pecuniary legacy being revoked, or, from whatever cause, failing, becomes a part of the residue for the benefit of the residuary legatee; but if a gift of some portion of the residue itself fails, the residue being given as in this instance, in distinct shares, the share so failing will not accrue to the remaining shares, but belongs as undisposed of to the next of kin. *Bagwell* v. *Dry* (*a*), *Page* v. *Page*. (*b*) In *Leake* v. *Robinson* (*c*), Sir *William Grant* observing, that "with regard to personal estate, every thing which is ill given by the will falls into the residue, and that it must be a very peculiar case indeed in which there can at once be a residuary clause, and a partial intestacy," subjoins the qualification, "unless some part of the residue itself be ill given." In *Cresswell* v. *Cheslyn* (*d*), the testator having by his will given his residuary estate among his three children, equally as tenants in common, by a codicil revoked the appointment of one of the residuary legatees, giving to her a pecuniary legacy. Lord *Northington* declared that her share belonged, not to the other residuary legatees, but to the next of kin; and his decree was affirmed in the House of Lords. (*e*) The objection to that decision suggested by a high legal au-

(*a*) 1 *P. Wms.* 700., and see the cases cited by Mr. *Cox*, n. 2.
(*b*) 2 *P. Wms.* 489. *Str.* 820. *Mos.* 42.
(*c*) 2 *Mer.* 363. See p. 592.
(*d*) 2 *Eden*, 123.
(*e*) *Cheslyn* v. *Cresswell*, 3 *Bro. P. C.* *Ed. Toml.* 246.

 thority,

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thority (a), is not applicable to the present case; the words of gift or declaration of trust remaining in this will, and nothing being erased but the name of the legatee.

Mr. *Parker* for Mrs. *Burrow.*

The testator having erased the name of *Hanah Northcote* from his will, and by his codicil recognised the erasure, denoted an intention wholly to revoke and annul the gift to her. The will, therefore, must be read as if that clause had never been inserted in it. No reason is assigned for imputing to the testator the design to die intestate as to this stock. The will and codicil stand as if the bequest, which is revoked, had never been expressed; and under the will so framed Mrs. *Burrow*, in addition to her share of the capital of the 500*l.* stock, as one of the testator's next of kin, and as the executrix of *Helen Coley*, is entitled to the dividends of the stock during her life.

The MASTER *of the* ROLLS.

The question with respect to the sum of 500*l.* bank-annuities, given by the will of *Simeon Coley* the father, is, whether the rule applicable to residue is different from that which prevails in the case of every other legacy? It seems clear on the authorities, that a part of the residue of which the disposition fails, will not accrue in augmentation of the remaining parts, as a residue of residue; but instead of resuming the nature of residue, devolves as undisposed of. Residue means all of which no effectual disposition is made by the will, other than the residuary clause; but when the disposition of the residue itself fails, to the extent to which it fails, the

(a) Serjeant *Hill. ap.* 2 *Eden*, 126. n.

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will is inoperative. In the instance of a residue given in moieties, to hold that one moiety lapsing should accrue to the other, would be to hold that a gift of a moiety of the residue shall eventually carry the whole. Whatever argument applies to the entirety of the moiety applies to every part of it; the distinction is mere subdivision. In this case the testator, in the event of one daughter dying without children, instead of disposing of her moiety of the residue entirely, divides it, and gives 500*l.* to his daughter *Hannah:* she ceasing to be an object of his bounty, he substitutes no other person.. Of that sum, therefore, which once formed a portion of the residue disposed of, in the actual event, no disposition is made, and the testator is as to that intestate.

July 8. 15.

The cause was again mentioned on the subject of costs, the question being whether the costs should be defrayed from the general residue, or from the sum of 500*l.*, the portion of residue which had lasped. An objection was also suggested to the frame of the suit, instituted by the legatees of *Simeon Coley* the son, instead of his personal representatives, without any allegation of fraud. *Elmslie* v. *M'Aulay.* (*a*) The following cases were cited as authorities for the proposition, that the costs should be paid by the general personal estate. *Attorney-General* v. *Earl of Winchelsea.* (*b*) *Curtis* v. *Hutton.* (*c*) *Cresswell* v. *Cheslyn* (*d*), from the registrar's book.

(*a*) 3 *Bro. C. C.* 624.

(*b*) 3 *Bro. C. C.* 373., under the correct title of *Attorney-General* v. *Hurst*, 2 *Cox*, 364.

(*c*) 14 *Ves.* 537.

(*d*) 2 *Eden*, 123. The fact is not mentioned in the printed report, but by the register it appears that the costs of all parties were paid out of the general estate Reg. Lib. A. 1761. fol. 180.

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The Master of the Rolls said, that the objection of form was too late, and the interest of all parties would be promoted, by permitting the suit instituted for settling a family question to proceed; that the cases cited of gifts to charities, in which the costs had been apportioned between the charitable fund and the general residue, were not precisely parallel to the present case; for if the gift to the charity failed, the fund would form part of the general residue, comprehending all not effectually disposed of; but the question here was, whether the sum of 500*l.* was not more undisposed of than the residue distributed specifically among legatees named; and in that respect, the case of *Cresswell* v. *Cheslyn* was more analogous to the present; that the claims of the residuary legatees, and next of kin of *Coley* the elder, required to be decided before any disposition could be made of the fund in Court, and the costs of that decision were chargeable on his estate; but that the increased expense occasioned by the institution of the suit in behalf of the residuary legatees, instead of the representatives, of *Coley* the younger, and by questions between them, must be defrayed from the estate of the latter.

The decree declared, that the sum of 500*l.* 5 *per cent.* annuities, in the will of *Simeon Coley* the elder mentioned to be given to his daughter *Hannah Northcote*, whose name was afterwards struck out of the will, remained undisposed of, and, together with the dividends accrued since the death of *Helen Coley*, became distributable among the next of kin of *Simeon Coley* the elder, living at his decease; and directed an account of such dividends, and payment of them, one-fourth to *Latrobe* and *Clarke*, the surviving executors of *S. Coley* the younger; one-fourth to *Hannah Northcote*; one-fourth to *E. A. Burrow*; and the remaining one-fourth to *E. A. Burrow*, as the executrix of *Helen Coley*. The

decree

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decree also directed the Master to tax, "as between solicitor and client" (*a*), the costs of all parties, except the bank, and apportion the same, and ascertain how much related to the question arising on the will of the testator *S. Coley* the elder, respecting the 500*l.* bank-annuities, and how much to the 800*l.*, and how much to the residue of the 2700*l.* (*Helen Coley*'s moiety): so much of the 500*l.* as would raise such part of the costs as the Master should apportion in respect of the said 500*l.* to be sold and paid into the bank to the credit of the cause, the remainder to be paid to the same parties, and in the same proportions, as before specified for payment of the accrued dividends.

Reg. Lib. B. 1817. fol. 603—606.

Directions omitted by mistake in a decree, introduced on motion with the consent of all parties.

(*a*) The words between inverted commas, interlined in the registrar's book, were omitted by mistake in the original decree, and introduced on an application by Mr. *Maddock* for the Plaintiffs, with the consent of all parties, on the 29th of *April*, 1819. See *Madd.* Principles and Practice of Chancery, 2d edit. vol. ii. p. 487, 488., and the cases there cited.

GRESLEY *v.* ADDERLEY.
GRESLEY *v.* HEATHCOTE.

May 21.

A mortgagee of a term created for raising portions, and expired, is not entitled to an account of rents and profits in the hands of a receiver, accrued before the expiration of the term.

BY indentures of lease and release, dated the 20th and 21st of *July*, 1697, Sir *Thomas Gresley*, Bart. and *Frances* his wife, and *William Gresley*, his son and heir apparent, conveyed to trustees certain estates in the county of *Derby*, as to part, to the use of *William Gresley* for life; remainder to the use of *Barbara* his wife, for life, in lieu of dower; and as to the rest, to the

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use of Sir *Thomas Gresley* for life; remainder as to part, to the use of *Frances Gresley* for life, in lieu of dower; remainder as to the rest, from the death of Sir *Thomas Gresley*, to the use of *Gilbert Thacker* and *Thomas Skeffington*, their executors, &c. for the term of one hundred years; remainder as to the part limited to *Frances Gresley* for life, from her death, to the use of *Thacker* and *Skeffington* for the like term of one hundred years; remainder to *William Gresley* for life; remainder to trustees to preserve contingent remainders; remainder to his first and other sons in tail-male, with ulterior remainders, and the ultimate remainder to the heirs of Sir *Thomas Gresley*. The trusts of the terms of one hundred years were declared to be for raising 3000*l.* for the portions of the three daughters of Sir *Thomas Gresley*, and, in certain events, 4000*l.* for the younger children of *William Gresley*; with a proviso, that in case any of the persons entitled to the inheritance should pay the sums so to be charged, the terms should remain a security for reimbursing them, with interest from the decease of the person making the payment.

The first term commenced on the death of Sir *Thomas Gresley* in 1699; and the second, on the death of *Frances Gresley*, in *July*, 1711.

Sir *William Gresley* died in 1711, leaving *Thomas Gresley* his only son, and *Bridget* (afterwards the wife of *Adam Otley*) his only daughter, the latter of whom became entitled to have the sum of 4000*l.* raised by sale or mortgage of the estates comprised in the terms.

By indenture of assignment and mortgage, dated the 5th of *October*, 1719, *Elizabeth Thacker*, the representative of the surviving trustee, in consideration of 3000*l.* paid to *Otley* and his wife by *Arabella Marrow*, and

and 1000*l.* paid to them by *John Browne*, assigned the premises comprised in the terms to *R. Wilmot*, his executors, &c. in trust for *Marrow* and *Browne*, subject to redemption.

In 1746, Sir *Thomas Gresley*, the son of Sir *William*, died; and, in 1753, Sir *Thomas Gresley*, his son, also died, leaving *Wilmot Gresley* his only child, who thereupon became entitled to the fee-simple of the estates, subject to the mortgage debt of 4000l.

In 1776 on the marriage of *Wilmot Gresley* with *Nigel Bowyer Gresley*, by indentures dated the 16th and 17th of *January*, certain estates, including those comprised in the terms, were conveyed (subject to a term of 1000 years, for raising a sum not exceeding 14,000*l.*, according to the appointment of *Wilmot Gresley*) to the use of Sir *Nigel Bowyer Gresley* for life, with remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the marriage, in tail-male; remainder to the use of such persons as *Wilmot Gresley* should appoint.

Wilmot Gresley died in 1790, leaving no son, and having by her will and codicil made a provision for her daughters, and limited the estates, after the decease of Sir *Nigel*, to the use of his first and other sons in tail-male, with ulterior remainders.

Letters of administration with the will and codicil annexed, were granted to Sir *Nigel*, who continued in possession of the estates as tenant for life, subject to the mortgage debt for 4000*l.*, and the sums which *Wilmot Gresley* had directed to be raised. By his second marriage Sir *Nigel* had issue *Roger*, his eldest son.

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The second term of 100 years, which commenced in 1711, having become vested in the Earl of *Buckinghamshire*, *John Sullivan*, and *George Davis*, as trustees for *Edward Desbrowe*, on their application for payment of the sum of 4000*l.*, Sir *Nigel* executed a bond, payable by instalments, and paid 3600*l.*, leaving 400*l.* unpaid at his death, on the 26th of *March*, 1808.

By his will, dated the 18th of *February*, 1808, he gave all his real and personal estate to his executors, Sir *John Heathcote*, *William Gresley*, *Edward Sneyd*, and *Theophilus Levett*, for the benefit of his three daughters.

Three of the executors proved the will, and paid the remaining instalment of 400*l.* and all interest due on the mortgage, and took an assignment of the term by indenture of the 20th of *August*, 1808.

The first suit was instituted by the infant Sir *Roger Gresley*, against one of the trustees appointed by *Wilmot Gresley*, to raise a sum for her daughters, (the trustee having, on the death of Sir *Nigel*, taken possession of the estates,) for the appointment of a guardian, and maintenance, and a receiver. (*a*) To the second cause the executors of Sir *Nigel*, and the persons interested in the estates, were Defendants.

By an order in the first cause, dated the 3d of *June*, 1808, it was referred to the Master to appoint a receiver of the rents and profits of the real estates of Sir *Roger Gresley*, including the estates comprised in the term of 100 years; Sir *John Heathcote* was afterwards appointed, and the rents and profits received by him were paid into Court. The decree pronounced on the

(*a*) Reg. Lib. A. 1817. fol. 1515.

25th

25th of *June*, 1808, directed a reference to the Master for the appointment of guardians, and allowance of maintenance to the Plaintiff, and an inquiry to what charges and incumbrances the estates were subject, and what was due in respect of them, and ordered the receiver to keep down the interest of the incumbrances affecting the estates. (*a*)

On the 28th of *September*, 1809, *Sneyd* and *Levett*, two of the executors of Sir *Nigel Gresley*, (no previous measures having been taken by them to obtain possession of the estates, or the receipt of the rents and profits by virtue of the term, or to establish a charge under the decree,) and his two surviving daughters and their husbands, filed a bill against Sir *Roger Gresley*, as tenant in tail of the estates, and against the trustees and incumbrancers, for an account and payment of what was due to Sir *Nigel's* executors in respect of the sum of 4000*l.*

By an order dated the 29th of *June*, 1813, made in both the causes of *Gresley* v. *Adderley*, and *Gresley* v. *Heathcote*, proceedings in the second cause were stayed.

On the 1st of *December*, 1817, the cause of *Sneyd* v. *Gresley* was heard at the Rolls, and the bill was dismissed (*b*), on the ground that the term had expired.

On this day Sir *John Heathcote*, *Sneyd*, and *Levett*, moved, in both the former causes, for liberty to go in before the Master, and make proof of what was due to them, as executors of Sir *Nigel Gresley*, under the indentures of the 20th and 21st days of *July*, 1697, and that the Master might take an account of the rents and profits of the premises comprised in the term mentioned

(*a*) Reg. Lib. A. 1817. fol. 1515.
(*b*) Reg. Lib. B. 1817. fol. 242.

in

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in those indentures, which had come to the hands of the receiver from the time of his appointment to the expiration of the term, or which accrued during that period.

Mr. *Hart* and Mr. *Dowdeswell* for the motion.

The question is, whether the persons entitled to the money secured by the term are to lose the benefit of that security. The rents accruing during the term are received for the use of the termor. The suit instituted for rendering the security available, in consequence of delays occasioned by deaths of parties, was not heard till after the expiration of the term, and as there could be no foreclosure of a term expired, the bill was dismissed. The Court will not refuse that relief which would have been given, if the money had not been secured by a term. No report has yet been made of debts and incumbrances; the executors are entitled to a report as incumbrancers.

Sir *Samuel Romilly* and Mr. *Joseph Martin* against the motion.

The amount claimed was a debt of the estate, and can be enforced, therefore, only to the extent of the interest pledged, a term which has expired. The motion seeks to have the whole principal of the debt paid out of the rents and profits. Even on an application while the receiver was in possession, during the term, it would have been very doubtful whether such an order could be made; the regular direction to the receiver is to keep down interest, not to pay off debts and incumbrances. At least the Court never, for such purpose, directs a retrospective account of rents. The appointment of a receiver in a cause to which the incumbrancers are not parties, can not aid their claim.

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The sum in question could not be the debt of any indi-

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individual, and could remain the debt of the estate, so long only as the estate is charged. By the operation of the deeds, the estate has contracted debt, for a term of 100 years, and at the expiration of that term is discharged. The question comes round to this, whether the Court, having appointed a receiver, towards the close of the term of 100 years, when the mortgagee might, perhaps, have been entitled here, if not at law, to receive the rents, will pay the charge out of the rents so received? That question I will not decide on motion: the parties are at liberty to file a bill. But there is a great difficulty in the way.

The appointment of a receiver is for the benefit of incumbrancers only so far as expressed to be for their benefit, and as they choose to avail themselves of it.

The order appointing a receiver is for the benefit of incumbrancers only so far as expressed to be for their benefit, and only so far as they choose to avail themselves of it. The Court would not deprive them of the advantage of their legal estate; they might perhaps be obliged to come here to be examined *pro interesse suo*(a); but this Court would not interfere against them. But I apprehend that when the Court interposed to receive the rents beyond what was required for keeping down the interest on incumbrances, all the surplus rent, after payment of interest, was received for the benefit of the heir. I think that the mortgagee of a term, if he chooses not to lay his hands on the rents during the term, must be in the situation of a mortgagee in fee, who has suffered the rents to be applied for purposes other than the satisfaction of his security. (b)

A mortgagee of a term is not intitled to a retrospective account of rents and profits.

Motion refused.

(a) *Hunt* v. *Priest*, 2 *Dick*. 540.

(b) See *Higgins* v. *The York Buildings Company*, 2 *Atk*. 107. *Mead* v. *Lord Orrery*, 3 *Atk*. 244. *Colmun* v. *Duke of St. Albans*, 3 *Ves*. 25. *Drummond* v. *Duke of St. Albans*, 5 *Ves*. 433. *Ex parte Wilson*, 2 *Ves. & Bea*. 252.

APPENDIX.

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The PRINCESS of WALES *v.* The EARL of LIVERPOOL, *ante*, p. 114.

"HIS Lordship doth order that the Defendants have a fortnight's time to answer the Plaintiff's bill, to be computed from the time when the Plaintiff, Her Royal Highness *Caroline Augusta*, Princess of *Wales*, shall have produced and left in the hands of her clerk in Court the said promissory note, or instrument in writing, bearing date the 24th day of *August*, 1814, in the bill mentioned; whereby it is alleged, that *William* Duke of *Brunswick*, deceased, assured to the Plaintiff payment, in the month of *August*, 1816, of the sum of 15000 *French Louis*, at the rate of 24 *French* livres each, together with interest for the same; and it is ordered that the Defendants, their clerk in Court, and solicitor, after the same shall have been produced, have liberty to inspect the same, and take copies thereof, or extracts therefrom, as they shall be advised, but the same is to be at their own expense."

Reg. Lib. B. 1817. fol. 768.

PREBBLE *v.* BOGHURST, *ante*, p. 309.

A bond executed on the marriage of the obligor, conditioned to settle lands as freehold.

"HIS Lordship doth declare that the condition of the said bond of the 10th day of *August*, 1768, in the pleadings in these causes mentioned, ought to be "if he should become seised in possession," affects copyhold as well

speci-

specifically performed; and that according to the true construction of the said condition, all the freehold and copyhold (*a*) messuages, tenements, lands, and hereditaments, which *John Prebble*, the testator, in the said pleadings mentioned, became seised of in possession at any time during his natural life, ought to be settled upon the issue of the said *John Prebble* and *Mary Townshend*, his first wife; and his Lordship doth declare that *Mary Townshend*, the first wife of the said testator having died in his lifetime, *John Prebble*, *Thomas Prebble*, *Richard Prebble*, and *Letitia Fenner*, four of the Plaintiffs in the said original cause, the only children of the said *John Prebble* by the said *Mary Townshend*, became entitled to have all the messuages, tenements, lands, and hereditaments, of which the said testator died seised in possession, conveyed to them as tenants in common in fee, free from any charges or incumbrances, and to have also the title-deeds thereof delivered to them, and also entitled to the clear rents and profits thereof, from the death of the said testator, after all just allowances and deductions; and also entitled to be paid and compensated out of the said leasehold and other personal estate and effects of the said testator, for all the said

(*a*) The report of the judgment, (*ante*, p. 519.) represents the Lord Chancellor to have expressed a clear opinion, that the bond, being conditioned for settling lands of which the obligor should become seised in possession, would not affect leasehold or *copyhold* estates; the decree, however, directs, it will be observed, a settlement of the obligor's *copyholds;* it is to be presumed, therefore, that his Lordship's expressions on the former occasion were misunderstood. The direction in the decree seems conformable to the authorities. The possession of a copyholder entitled to an estate of freehold or inheritance, is, in pleading, denominated seisin; the copyholder being described, in the first instance, as seised in his demesne as of freehold, and in the second, as seised in his demesne as of fee, according to the custom of the manor. *Bro. Abr. Tenant per Copie*, pl. 13. *Co. Entr.* 206. 1 *Saund.* 147. *Co. Copyholder*, 11.

 free-

1818.

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to trustees all household goods, furniture, glasses, and linen, &c. in his mansion-house, (except the family pictures and prints not framed,) to sell such parts as should be in his house (except his family pictures) as they should think proper, the other part, which might be thought worth keeping, to be removed to his house at *R.*, and to dispose of, or to retain, such of his effects at *R.* as they should think proper; and after his debts should be reduced to 35,000*l.*, then as to his family pictures, and such of his effects at *R.* as should remain unsold, in trust for *R. L.* if living, for his own proper use and benefit; but if he should die without leaving issue male living, in trust for *J. L.* or such person as should become entitled to the possession of his estate at *R.*, for the same right and interest as before declared with regard to *R. L.*:

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2. *J. P.*, on his marriage with *M. T.*, executed a bond in the penalty of 2000l. with condition to be void if, in the event of *M. T.* surviving *J. P.*, his executors, &c. should, within three months after his decease, pay to trustees 1000l. in trust for *M. T.*, and if, in the event of *J. P.* surviving *M. T.*, and there being any child or children of the marriage living at the decease of *J. P.*, his executors, &c. should, within three months after his decease, pay to trustees 1000l. in trust for such child or children; "and farther if *J. P.* should, at any time during his natural life, become seised of any messuages, &c. in possession, and should settle the same upon *M. T.*, and the issue of the said intended marriage; by such good conveyances in the law as counsel should advise in such parts and proportions, and to such use and uses, as should be thought requisite, the better to make a provision for *M. T.* in case she should happen to survive *J. P.*;" after the death of *M. T.*, *J. P.* having married again, and then, and not before, become seised of real estates, and having at his death left issue by both marriages, all the real estates of which he became seised during his life were subject to the obligation, and settled on the issue of the first marriage as tenants in common in fee. *Prebble* v. *Boghurst*. *Page* 309

3. Where marriage is one of the considerations, the amount of pecuniary consideration is immaterial. 319

4. An obligation to make a settlement on the wife and the issue, includes an obligation to make a settlement on the issue after the death of the wife. *Ibid.*

See Appointment, 1.

MASTER.

See Practice, 4, 5. 7.

MINES.

See Injunction, 3.

MOTION.

See Practice, 6.

MORTGAGE.

1. A mortgagee of a term created for raising portions, and expired, is not entitled to an account of rents and profits in the hands of a receiver, accrued before the expiration of the term. *Gresley* v. *Adderley*. 573

2. A mortgagee of a term is not

entitled to a retrospective account of rents and profits. *Page* 579

P

PARENT AND CHILD.

1. Under a bequest of stock, in trust to pay the dividends to *M. H. H.*, the niece of the testator, "for and towards the maintenance, education, and bringing up of all and every the child and children of the said *M. H. H.* until he, she, or they shall attain twenty-one," then to transfer the principal equally among the children, with a bequest over in default of such issue, to the nephews and neices of the testator living at the death of *M. H. H.*; the dividends are payable to *M. H. H.*, although she has no child. *Hammond* v. *Neame*. 35

2. In an arrangement settling the interests of all the branches of a family, children may contract with each other to give to a parent who had a power to distribute property among them, some advantage which the parent, without their contract with each other, could not have. 136

See APPOINTMENT, 1.

PAROL AGREEMENT.

See SPECIFIC PERFORMANCE, 1.

PARTNERSHIP.

1. Stipulations in articles of partnership for an annual settlement of accounts, and for payment to the representatives of a deceased partner of an allowance in lieu of profits since the last annual account, proportioned to the amount of his share of profits, during two years preceding, are waived in equity by omission through several years to settle annual accounts, and by engaging in business to which the stipulations cannot be applied without injustice; and an injunction was granted to restrain the representatives of a deceased partner from proceeding on a bond given by the surviving partners, for repayment of his share according to the articles, before the settlement of accounts of transactions pending at his decease, on which a loss was subsequently sustained. *Jackson* v. *Sedgwick*. *Page* 460

2. Partnership articles containing special clauses for taking the accounts, on which the parties have not acted, read in equity as if those clauses were expunged. 469

3. Articles of partnership having provided, that on dissolution by death, notice, or misconduct, of a partner, the remaining partners should have the option of taking his share at a valuation, payable by yearly instalments in the course of seven years; and that on the bankruptcy or insolvency of a partner, the partnership should be immediately void as to him; by a deed, four years subsequent, the partners declared (after a recital that such was their

intention in the articles), that in the event of bankruptcy or insolvency, the same arrangement should be practised as on dissolution by death, notice, or misconduct: one of the partners having become bankrupt within a few months after the execution of the latter deed, his assignees are not bound by it. Whether a provision in articles of partnership, that on the bankruptcy of a partner his share shall be taken by the solvent partners, at a sum to be fixed by valuation, and payable by instalments in a course of years, is not void by the statutes concerning bankrupts. *Quære*. *Wilson* v. *Greenwood*. *Page* 471

4. Where some members of a partnership, either in the ordinary course of trade, or in closing the transactions after a dissolution, seek to exclude others from a just share in the management, the Court appoints a receiver. 481

5. *R. C.* being in possession of mines and iron-works, held under leases of unequal duration, by his will bequeathed 25,000l. to *B.*, "as a capital for him to become a partner with my executor of one-fourth share in the trade of all those works, so long as the lease endures," with a devise to *H.* and his wife of the residue of his estates, real and personal; by a codicil the testator gave to *W. C.* three-eighths of the concern at the iron-works, "so the partnership will stand at my decease, *W. C.* three eighths, *H.* three-eighths, *B.* two-eighths." After the testator's death, *W. C.*, *H.*, and *B.*, carried on the works for two years, selling iron manufactured not only from the produce of their mines, but from ore and old iron purchased for the purpose of manufacture and re-sale. *B.* having then assigned his share to *C.*, the business was carried on in like manner, by *C.* and *H.* till the death of the latter; no agreement having ever been entered into for the duration of the partnership.

1. The codicil withdraws the trade from the operation of the residuary clause in the will, and vests three-eighths in *H.* to the exclusion of his wife.

2. The concern is not a mere joint interest in land, but a partnership in trade.

3. The purchase of a leasehold interest as part of a stock in trade, is not evidence of an agreement to contract a partnership commensurate with the duration of the lease.

4. The partnership is dissolved by the death of *H.*

5. In a suit instituted by *W. C.*, praying a sale of the partnership property, the Court, on motion, directed an inquiry whether it would be for the benefit of all parties interested that the works should be sold, or carried on for the purpose of winding up the concern. *Crawshay* v. *Maule*. *Page* 495

6. On a suit instituted for the dissolution of a partnership, it being clear

on the bill and answer that some party is intitled to a dissolution, a sale of the partnership property may be directed on motion. *P.* 506

7. If a partnership is actually ended, no person can make any use of the property inconsistent with the purpose of winding up the concern. 507
8. Where the contract neither expressly nor by reference limits the duration, the partnership may be terminated at a moment's notice by either party. 508
9. Reason of the doctrine that a partnership is dissolved by death. 509
10. There is no general rule that partners purchasing a leasehold interest, must be understood to have entered into a contract of partnership commensurate with the duration of the leases. 521
11. In the instance of a trading partnership actually dissolved, the Court orders a sale on motion. 523

PENSION.

See Alienation, 3.

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See Specific Performance.—Covenant, 1.—Satisfaction, 1.

PERSONAL ESTATE.

1. The general personal estate exempted from the payment of a particular legacy. *Gittins v. Steele.* 24
2. In the event of the deficiency of a particular fund appropriated to the satisfaction of certain bequests, the Court, on the question of the exemption of the general personal estate, cannot advert to the fact of a sale of part of the testator's property subsequent to the will, by which the particular fund has become insufficient. *Gittins* v. *Steele. Page* 24.

See Parol Evidence, 1.—Will, 2.

PLEADING.

See Demurrer. — Discovery, 2. — Information, 1. — Practice, 13.

POWER.

The will (attested by three witnesses) of a person having a power to dispose of a fund consisting partly of real estates, and partly of household furniture, linen, and plate, containing a gift of "all my estates and effects of whatsoever denomination," and of "my household furniture, with linen and plate," is not an execution of the power. *Jones* v. *Curry.* 66

See Appointment, 1.—Parent and Child, 2.—Rent, 1.—Will, 5.

PRACTICE.

1. On a bill by a prebendary against his lessees, for a commission to ascertain the boundaries of the prebendal lands, the prebendary is entitled to name as many commissioners as his lessees. *Willis* v. *Parkinson.* 9
2. A notice for Monday the 12th January, being the first seal before Hilary term, is good notice for the first seal, though held on Thursday the 15th January. *Smith* v. ——. 10
3. By the order directing a party to be examined as a witness on the trial of an issue, no objection is waived, except that which arises from his being a party in the cause. *Rogerson v. Whittington.* 39

4. *All references of answers for insufficiency or for scandal and impertinence, or for impertinence, made in the same cause, shall be made to the same Master. *Order of Court.* *Page* 128

5. Where answers of Defendants have been referred for scandal and impertinence, or for impertinence, and the Court shall afterwards refer the same for insufficiency, the latter reference shall be made to the same Master as the former. *Ibid.* *Ibid.*

6. If a party gives notice of motion and does not move accordingly, he shall, when no affidavit is filed, pay to the other side forty shillings costs upon production of the notice of motion; but when an affidavit is filed by either party, the party giving such notice of motion and not moving, shall pay to the other side costs to be taxed by the Master, unless the Court itself shall direct, upon production of the notice of motion, what sum shall be paid for costs. *Ibid.* *Ibid.*

7. It is not competent to the Lord Chancellor to order the Master to review a report confirmed and followed by a decree of the Master of the Rolls, containing consequential directions while that degree stands *Turner* v. *Turner.* 154

8. The Master ordered to review his report after confirmation. 157

9. Defendant permitted to take exceptions to a report after confirmation, without having taken objections. 158

10. Exceptions permitted with reference to one subject of inquiry, after exceptions to the same report with reference to another subject allowed or overruled on argument. 160

11. A deposition *de bene esse* having been read at the hearing of a cause, it is of course, if any issue is directed, to order it to be read on the trial, notwithstanding an irregularity in the examination, which might have been effectually objected at the hearing. Whether the Court will suppress a deposition taken before commissioners, of whom one is attorney in a cause in *Scotland* between the same parties, on the same question, *quære. Gordon* v. *Gordon.* 166

12. When the interval is short between the publication and the hearing, the Court will grant time to examine whether the deposition was regularly taken, it being too late to object during the hearing. 171

13. A demurrer and answer filed by a Defendant attached for want of an answer, after orders for time to plead, answer, or demur, not demurring alone, ordered to be taken off the file. *Curzon* v. *De-la-Zouch.* 185

14. A Defendant having filed an answer and demurrer after a *cepi corpus* returned on an attachment for not answering, an order for a messenger obtained before the demurrer and answer (of which the Plaintiffs had bespoken an office

copy) had been taken off the file, discharged with costs. *Carzon* v. *De-la-Zouch.* *Page* 189

15. After a demurrer over-ruled, time to answer can be obtained only on a special application. *Jones* v. *Saxby.* 194

16. Infants being made co-plaintiffs in two suits relative to the same matter, the Court will not, before a decree, on the Master's report that one suit is more for the benefit of the infants, dismiss the bill in the other suit unless by consent. *Mortimer* v. *West.* 358

17. A Defendant may by answer protect himself from answering interrogatories tending to criminate him. 192

See Affidavit, 1.—Charity, 1.—Costs.—Decree.—Demurrer.—Injunction.—Lunatic, 4.—Partnership, 5, 6. 11.—Production of Documents.—Receiver.—Sequestration.—Solicitor, 1, 2. 4.—Specific Performance, 2.

PRINCIPAL AND AGENT.

An agent, defendant to a bill for an account by his principal, ordered, on motion, to leave with his clerk in court, documents in his possession, containing entries relating to the cause; sealing up entries on other subjects, and making affidavit that he has sealed such entries only. *Gerard* v. *Penswick.* 533

PRODUCTION of DOCUMENTS.

1. A Plaintiff is entitled to the production of documents referred to in the answer, and admitted to be in the custody of the Defendant, although an injunction obtained by the Plaintiff has been dissolved, on the ground that the contract which he seeks to enforce is illegal. *Evans* v. *Richardson.* *Page* 7

2. In ordering the production of documents, the Court proceeds on the principle, that they are by reference incorporated into the answer, and become a part of it. 8

3. In a bill against executors, the Plaintiff having stated two promissory notes of the same date, one for 15,000l. sterling, the other for 15,000l. French *louis*, given by the testator for securing a sum of 15,000l., on an affidavit by one of the executors, that he had inspected the first note, and observed on the face of it circumstances tending to impeach its authenticity; that he was informed, and believed, that the second note had been produced by the Plaintiff for payment in a foreign country; and that he was advised and believed that it was necessary, in order that his answer might fully meet the case, that he should, before answer, have inspection of the second note, it was ordered, that the Defendants should not be compelled to answer, till a fortnight after production of the second note. *The Princess of Wales* v. *the Earl of Liverpool.* 114

4. If a Plaintiff makes a demand on written instruments, without stating that they are in his possession, whether the Court will infer that

fact, unless an affidavit is made to the contrary, *quære*. *Page* 122

5. Reason of the practice requiring proof (beyond mere reference) of possession by the Defendant of a document previous to an order for production. 123

6. On a motion for an attachment for refusal of production and inspection of documents, pursuant to order, or for immediate inspection, the Defendants objecting that the documents contained passages improper for inspection, the Lord *Chancellor* refused the application, but directed the Defendants to pay the costs of it. *Jones* v. *Powell*. 535 n.

See Discovery, 1.—Injunction, 1. 4.—Principal and Agent, 1.—Subpœna Ducens Tecum, 1.

PROMOTIONS.

Page 334

PURCHASE.

1. A father having purchased in the names of his sons a copyhold estate, which he afterwards demised by licence obtained subsequently to the purchase; the sons take the estate successively, as an advancement. To repel the presumption of advancement, evidence of the father's intention must be contemporaneous with the purchase. *Murless* v. *Franklin*. 13

2. The presumption arising from the circumstances of the purchase of one estate, cannot be qualified by transactions relative to other estates. *Page* 19

R

REAL ESTATE.

See Parol Evidence, 1.—Will, 4.

RECEIVER.

1. Pending a question, whether estates devised were subject to a bond executed by the testator, for making a settlement on his wife and children, the Court refused to appoint a receiver, the devisees in trust consenting to pay the rents into court. *Prebble* v. *Boghurst*. 313

2. The appointment of a Receiver is for the benefit of incumbrancers, only so far as expressed to be for their benefit, and as they choose to avail themselves of it. 579

See Alienation, 1, 2.—Partnership, 4.

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See Injunction, 5.—Practice, 4, 5.

RELEASE.

See Gift, 1.

RENT.

1. Under a parol demise from year to year, by a tenant for life, with power to lease by deed, &c. the interest of the lessee determines with the life of the lessor, and the rent is apportionable. *Ex parte Smyth*. 337

2. A tenant for life with leasing power, having granted leases from year to year, some by parol, some in writing, but not conformable to the power, on his death, before the expiration of the year, the rents are apportionable. *Clarkson* v. *Lord Scarborough.* *Page* 354 n.
See SEQUESTRATION, 1.

REPLEVIN.

An action of replevin may be maintained for goods distrained under a warrant from commissioners authorised by act of parliament to levy rates for specific local purposes with power of distress. 304

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Under a sequestration, the landlord is entitled to be paid arrears of rent. *Dixon* v. *Smith.* 457

SET OFF.

The doctrine of set-off and mutual credit under the statute, is the same at law and in equity. 33
See BANKRUPT, 5.

SETTLEMENT.

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SOLICITOR.

1. A solicitor declining to be farther concerned in a cause, is not entitled to compel payment of his costs, by refusing to permit such inspection of the papers in his hands, or such production of them before the court or the master, as may be necessary in the conduct of the cause. *Commerell* v. *Poynton.* *Page* 1
2. After an order for the taxation of a solicitor's bill, staying proceedings at law till the report, the solicitor having died before a report, and no measures having been taken for continuing the taxation, his administratrix proceeding at law against the client, was held not to have committed a contempt. *Houlditch* v. *Houlditch.* 58
3. The Court will not order the personal representative of a deceased solicitor to deliver the papers in the cause to another solicitor, without payment, or security for payment, of the solicitor's bill. It seems that the summary jurisdiction of the Court extends to the representatives of a solicitor. *Redfearn* v. *Sowerby.* 84
4. In a cause which has been much delayed, the Court will not, at the expense of farther delay, relieve the Plaintiff from the consequences of the gross neglect of his solicitor. 156

SPECIFIC PERFORMANCE.

1. If a person possessed of a term, contracts to sell the fee, he cannot compel the purchaser to take, but the purchaser can compel him to convey the term, and this Court will arrange the equities between the parties. *Page* 54
2. Specific performance of a parol agreement to grant a lease, decreed on the testimony of one witness, confirmed by circumstances, against the denial in the answer, after part-performance by delivery of possession. *Morphett* v. *Jones*. 172
3. Specific performance refused of an agreement to grant a lease for a term expired before the hearing of the cause, the acts of waste committed during the possession of the premises not entitling the plaintiff, in an action on the covenants to be inserted in the lease, to more than nominal damages. *Nesbitt* v. *Meyer*. 223
4. Whether specific performance of an agreement to grant a lease will in any case, be decreed after the expiration of the term, *quære*. 226
5. On a bill by a purchaser for specific performance of a contract for the sale of an estate, a vendor who, during 15 years, had retained possession of the whole estate, and of one-third of the purchase-money, was, under the circumstances, charged with interest on one-third of the rents and profits. *Burton* v. *Todd*. 255

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SUBPŒNA DUCENS TECUM.

1. Under a *subpœna ducens tecum*, the party may, in Court, object to produce the documents: but if the objection is overruled, production will be compelled. *Page* 209

T

TENANT FOR LIFE.

See Construction, 1.—Rent, 1, 2.

TENANT FROM YEAR TO YEAR.

See Rent, 1, 2.

TIMBER.

See Appointment, 1.

TITHES.

See Award, 6.

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See Costs, 2.

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An equitable interest under a contract of purchase may be the subject of sale; the subcontract converts the original vendee into a

trustee of his equitable interest for his vendee, who acquires the same rights which he had to the benefits to be derived under the primary contract. Such subcontracts are not within the doctrine of champerty and maintenance. *Page* 56

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WASTE.

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WILL.

1. For the purpose of collecting the intention, every part of the will must be considered. 28
2. Bequest of personal estate being in trust, to pay the interest to *M.* the testator's widow, during her life, and on her death "to pay and divide the trust-monies unto and equally between his daughters *H.* and *A.*, for their own use and benefit absolutely, and in case of the death of them *H.* and *A.*, or either of them, leaving a child or children living," to apply the interest for the maintenance of the children till 21, then to divide the trust-money among them, expressing that the testator's intention was, that the children of his daughters should be entitled to the same shares to which their mother would be entitled if then living, with an ultimate trust in case of the death of *H.* and *A.*, without leaving issue living at their respective death, or of all their children dying minors; on surviving the tenant for life, *H.* and *A.* become entitled to the absolute interest. *Galland* v. *Leonard.* *Page* 161
3. Bequest of 3000l. stock to *W.*, the testator's son by a first marriage, (his second wife and a son by her being living,) the interest to be appropriated to his maintenance under the direction of trustees till he attained 24, and of the residue of the testator's personal estate, (the interest being given to his wife during her widowhood, after her decease or marriage) "unto any child or children I may have by my wife, to be equally divided between them that attain the age of 21 years, the survivor of my children to possess what is here bequeathed to the other; but should not either of my children attain the age of 21 years, or live to possess what is here bequeathed to them, I then bequeath" to the children of the testator's sister the 3000l. stock; the son by the second marriage dying in the life of the testator, and there being no other issue of that marriage, *W.* is entitled to the stock and to the residue. *Hill* v. *Smith.* 195
4. Testamentary papers in this form: "I leave and bequeath to all my grandchildren, and share and share alike;" and "further, I appoint *T. H.* and *T. E.* my trustees for all

my grandchildren and nieces;" are void for uncertainty, and pass no interest in the real estate. *Mohun* v. *Mohun*. *Page* 201

5. A testator having by his will devised his freehold and copyhold estates in trust for his son in strict settlement, with remainder to his nephew; and having given by his first codicil, a special power of sale over a part of his estates, to be exercised at the request of his son in favour of his nephew; and, by his second codicil, a general power of sale over "all or any part of his estates," to be exercised at the discretion of his trustees; the conveyance by the trustees must contain both the particular and the general power of sale. *Greene* v. *Wiglesworth*. 234

6. A testator having by his will directed his executors to transfer 500l., part of his residuary estate, to *H. N.*, and made a specific disposition of the other parts, and having afterwards drawn a pen through the name of *H. N.*, and by a codicil declared that he razed her name out of his will with his own hand; the 500l. belong, as undisposed of, to his next of kin. The costs of ascertaining the right to that sum, paid thereout, in exemption of the general residue. *Skrymther* v. *Northcote*. *Page* 566

See Construction, 4. — Covenant, 1. — Heir Loom, 1. — Legacy. — Parol Evidence, 1. — Partnership, 5. — Personal Estate, 1. — Power, 1.

WITNESS.

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